Supreme Court, U.S.
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NUMBER:_____

UNITED STATES SUPREME COURT

JO-ANN CROSSLEY

Petitioner

VS

HERMAN FERRÉ-ROIG

Respondent

On Petition for Writ of Certiorari to the Court of Appeals
Of the Commonwealth of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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(Translation)

QUESTION PRESENTED FOR REVIEW:

Whether or not a state court, in determining the ownership of shares in a publicly traded corporation can ignore the provisions the Securities and Exchange Act of 1933, 15 U.S.C. 78 *et seq.* that require corporate disclosure statements to the Securities and Exchange Commission, as to the truth and reality of corporate ownership, participation and control, and pursuant to said act. And whether or not a party who has stated for the official record of the Securities and Exchange Commission that the shares of a publicly traded corporation belong to him and his wife, is estopped from claiming, in a liquidation of community property action that the shares belong to him exclusively.

PARTIES:

Only those on the caption of the case.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Not applicable, the parties are natural persons.

TABLE OF CONTENTS OF THE PETITION Pages

1.- Consise statement of the basis for jurisdiction 4

1.3.- Applicable Constitutional and statutory provisions 4-6

1.4.- Consise statement of facts 6-10

1.5.- When federal question was raised 10-12

2.- Argument for issuance of writ 12-15

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TABLE OF CITED AUTHORITIES

	Page
1.- Constitution of the United States	4,8,12
2.- Laws	
15 USC 78 et seq	1
28 USC 1258	4
15 USC 78b	5
15 USC 78o(d)	5
15 USC 78ff	6, 10,13
2.- Cases	
Rubio Sacarello v. Roig, 84 DPR 344(1962)	14
Serra v Salesian Society, 84 DPR 322 (1962)	14
Holman v. Jonson, 2 Cowp 341, 98 English Reports (Full Reprints) 1120 (1775)	14

1.- CONSISE STATEMENT OF THE BASIS FOR JURISDICTION.

1.1- The judgment sought to be reviewed was entered on October 19th, 2005 by the Court of Appeals of the Commonwealth of Puerto Rico.

From said judgment, a Petition for Certiorari was filed with the Supreme Court of the Commonwealth of Puerto Rico on November 18, 2005, which was DENIED, and the denial was entered on March 7th., 2006.

Petitioner herein filed two Motions for Reconsideration, the Second Motion for Reconsideration was DENIED, and petitioner was instructed to ABIDE BY IT, on May 12, 2006, and the denial WAS ENTERED ON MAY 15th, 2006.

1.2- Statutory provision conferring jurisdiction: 28 U.S.C. sec. 1258:

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

1.3- APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS:

Constitution, Article VI, Cl 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Securities and Exchange Act of 1934, 15 U.S.C. 78 *et seq.*

a) 15 U.S.C. 78b

b) 15 U.S.C. 78o(d):

(d) Filing of supplementary and periodic information. Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to the date of enactment of the Securities Acts Amendments of 1964 [enacted Aug. 20, 1964], and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended [et seq.], shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 13 of this title [15 USCS § 78m] in respect of a security registered pursuant to section 12 of this title [15 USCS § 78l]. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 12 of this title [15 USCS § 78l]. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may, for the purpose of this subsection, define by rules and regulations the term "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent

> circumvention of the provisions of this subsection. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

c) 15 U.S.C. 78ff

1.4- CONSISE STATEMENT OF FACTS:

The case below was filed with the Court of First Instance of the Commonwealth of Puerto Rico, Carolina Section. It was an action filed for liquidation of the conjugal partnership of community property of the parties: Jo-Ann Crossley and Herman Ferré-Roig.

The main assets involved in this case were the shares of Puerto Rican Cement Co., a publicly traded corporation. The ownership and interest in property of the parties herein is described in the Puerto Rican Cement Co Inc.-Proxy filed with the Securities and Exchange Commission, as to 1998, obtained by undersigned, in person, from the offices of SEC on November 30th, 2001. The pertinent portion states the following:

> "As of March 19, 1998, Herman Ferre Roig (a first cousin of Antonio Luis Ferre and Rosario J. Ferre) owned directly 94,866 shares (1.76%) of the outstanding Common Stock of the Company. In addition, Herman Ferré Roig and his wife and children have a beneficial interest in and investment power regarding 469,674 shares (8.72%) of the Company's outstanding Common Stock held of record by Brim Incorporado, a Puerto Rican corporation owned by Mr. Herman Ferre Roig, his wife and children, as a result of their 100% ownership interest in Brim Incoporado. Mr. Ferre has sole voting and dispositive power regarding the shares held by Brim Incorporado." Separate Appendix page 9 of 20.

After many procedural controversies, and a first appeal to the Court of Appeals of the Commonwealth of Puerto Rico (which was denied as not been ripe), the case returned for adjudication to the Court of First Instance, and said court issued its judgment, without actual trial, since the parties submitted the controversies for adjudication from the documents, which were all stipulated.

The Court of First Instance refused to consider the shares of Puerto Rican Cement Co, Inc., held by Brim Incorporado, as community property and awarded them to respondent.

In its judgment, the Court of First Instance transcribed the position of petitioner herein *verbatim*, and then went on to deny the character of community property to the shares of Puerto Rican Cement Co. Inc., as follows:

> "3] With respect to the legal information about title the shares of Puerto Rican Cement Co., Don Hermán Ferré Roig submitted information so that Puerto Rican Cement could refer it to the Securities and Exchange Commission for various periods, [detailing who were] the shareholders of Puerto Rican Cement Co. In the above mentioned reports it is stated that a co-shareholder [was] the wife of Don Hermnan Ferré Roig that for the informed periods was the claimant .lo-Ann Crossley.
>
> The matter stated in the Last two paragraphs of the argumentative theory of claimant above transcribed do not represent actually any estoppel to award that the shares of Puerto Rican Cement Company in the tenancy of B.R.I.M.Incorporado are the exclusive of defendant. since clearly it is established by his tract of acquisition and negotiation. and as{like}. independently of it. it has been acknowledged in the stipulations signed by the parties.
>
> Appendix, page 53.
>
> (Emphasis added)

At to the stipulations between the parties, the Court of First Instance gave no weight to the statement by petitioner herein in the Amended Pre-Trial Report Between the Attorneys (reproduced in the Judgment of the Court of First Instance) that:

> "**[1]** ***In spite of what was stipulated*** **the claimant asserts, contrary to** the position of the defendant one that as for the principal assets of the parties, which constitute shares in Puerto Rican Cement Co., the party defendant *is prevented by its own*

> *acts* from denying the community property character of the above mentioned assets, since the shares of Puerto Rican Cement Co. have been *possessed* by both parts through several such corporations as Ponce and Panamá Marine Co (Panamanian entity) and, to the present, by B.R.I.M. Corp. (Puerto Rican entity) that received them from Ponce and Panama Marine Co. In litigations had between several groups of shareholders of the Ferré family, [therein] Don Herman Ferré Roig *claimed* that the shares of Ponce and Panama Marine Co *were a community property of the parties herein.* This happened in a case litigated before the Superior Court of Puerto Rico, and in other before the courts of Panama. The contradictory conduct is inadmissible in law.
>
> " Appendix, page 52.

What is important for review by this Honorable Court is that the fact that the Commonwealth of Puerto Rico Court of First Instance, did not considered itself bound by the statements respondent had provided to the Securities and Exchange Commission, pursuant to the Securities and Exchange Act, *supra*, which included information to the effect that respondent and his wife, and children, had a beneficial interest in and investment power regarding 469,674 shares (8.72%) of the Company's outstanding Common Stock held of record by Brim Incorporado. Therefore those statements did not represent, in said court's opinion, any bar to adjudicate that the shares of Puerto Rican Cement Company in the holding by BRIM Incorporado, are exclusive property of the defendant.

The Commonwealth of Puerto Rico Court of First Instance made its decision solely based on Commonwealth law: the Civil Code of Puerto Rico, and specifically completely disregarded the Securities and Exchange Act of 1934, *supra*, well it cannot constitutionally do so, under the provisions of Article VI, clause 2 of the Constitution of the United States.

Petitioner herein filed an appeal with the Court of Appeals of the Commonwealth of Puerto Rico, and said court affirmed the decision of the Court of First Instance, on October 19th., 2005.

The Court of Appeals of the Commonwealth of Puerto Rico, in its short judgment (6 pages) does not even mention the question of the information supplied to the Securities and Exchange Commission, even though said controversy was stated in the Brief on Appeal, as follows:

> "In relation to the legal information about entitlement of the shares of Puerto Rican Cement Co., Don Herman Ferré submitted information (by himself and/or through of his lawyer, Lcdo. Miguel Pascual Esteban) so that Puerto Rican Cement Co was informing the Security and Exchange Commission who were, for the diverse periods, the shareholders of Puerto Rican Cement Co. In the above mentioned reports it is shown as co-shareholder the wife of Don Herman Ferré Roig who for the informed periods was the claimant Jo-Ann Crossley." Appendix, page___.

And the Honorable Court of Appeals does consider important the "proxy statements" required by the Securities and Exchange Act, *supra*, well, it does not deem it important even to mention the Securities and Exchange Act:

> "The appealed court did not find any basis in either allegation of the appellant that the appellee was barred by his own acts to deny the community property character of the shares in controversy. " Proxi statement " on which it is based, does not have the meaning claimed, since it does not recognize a community property participation in the shares of PR Cement, not to have converted them in community during the existence of the marriage. The court examined the documents offered by the claimant and in none of them the supposed claim of community property appears. Consequently, the court issued judgment of liquidation of community properties, in which it excluded from the community property the shares of PR Cement in the tenancy of BRIM, for being exclusive propertyof the Appellee. It is from this partial judgment that [she] appeals before us."

A Petition for Writ of Certiorari was filed with the Supreme Court of Puerto Rico, which DENIED the Petition. Petitioner herein filed two motions for reconsideration which were also denied, and in the second one, said court ordered petitioner to abide by it. It was entered on May 15th., 2006.

1.5- WHEN FEDERAL QUESTION WAS RAISED:

The federal question herein raised: the provision of true and correct information to the Securities and Exchange Act of 1934, *supra,* was first raised in the petitioner's Reply to Motion for Summary Judgment filed in the Commonwealth of Puerto Rico Court of First Instance, Carolina Section, on October 9th., 2003:

> "From the quotation of Lord Mansfield it is clear that in situations like the one at bar, considerations of public order are present " public policy ", and it due to them and not because of any consideration for the adverse party that one denies to him the cause of action or defense to the other party, the defendant herein.. The consideration of public order is the presentation of information before the Securities and Exchange Commission in which the defendant declared the shares in controversy belonged also to his wife, and his current denial that said assertion is true.. If it was considered that the current position is the correct one (the shares belong to the defendant and not to him and to the claimant) then the information given SEC it was incorrect, and, therefore, the provisions of the Securities and Exchange Act of 1934, 15 78ff, would be operative, in that they provide as follows:
>
> > "§ 78ff. **Penalties**
> >
> > "(a) Willful violations; false and misleading **statements.** Any person who willfully violates any provision of this title (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made

unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any **statement** in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration **statement** as provided in subsection (d) of section 15 of this title [15 USCS § 78o (d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which **statement** was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

"(b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o (d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal **penalty** for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

"(c) Violations by issuers, officers, directors, **stockholders**, employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be fined not more than $ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of

section 30A [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1]shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

"(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or **stockholder** of an issuer, such fine may not be paid, directly or indirectly, by such issuer."

Appendix page 69-70

2.- ARGUMENT FOR ISSUANCE OF THE WRIT:

The question for review by this Honorable Court, it is respectfully submitted, is a question of first impression, and is of extreme importance given the experiences lived by the country in recent years with corporate irresponsibility and deceit, this, can be said to be the "social" consideration for the issuance of the writ in this case.

The legal-constitutional question is whether or not a state court is bound by the official information extant in the records of a federal agency, which have a presumption of correctness, when the information was filed pursuant to federal law: in this case, the Securities and Exchange Act of 1934, *supra*, and the agency: the Securities and Exchange Commission.; or can the state court disregard the force and effect of said federal law, in the face of Article VI, Clause 2 of the United States Constitution.

Are the records of a federal administrative agency reliable? Should they be? Do they have to contain true information? Are the individuals submitting information bound by the information they provide, or can they act in complete disregard of their statements to the federal agency? If so, why bother to require records, information, and reporting to the federal agency?

The statute in the case at bar, the Securities and Exchange Act of 1934, 15 U.S.C. 78ff does provides the following:

> "...or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title...
>
> "...which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both,..."

So, the preeminent interest in the truthfulness of the information required to be filed with the SEC is clearly established by law.

The issue here is NOT whether respondent has made a statement stating that the shares of Puerto Rican Cement Co, Inc., are his exclusive property, in contradiction with the statements made by him (through Puerto Rican Cement Co) to the SEC. Respondent has not made such statements, and, therefore, technically he is not in violation of section 78ff, *supra.* The question is whether the courts below could, legally, decide, based on other documentary evidence, not in any statements from respondents, and based on state law, that the shares in question belonged to respondent exclusively, although the record of the SEC, a federal agency said otherwise. And, of course, petitioner always thought herself to be a be co-shareholder, she also relied on the information of the proxy statements that included her in the disclosure.

What would be the proposition, that all investors, except the wife of one the shareholders, are entitled to have truthful disclosure of ownership of the shares of stock? Where is the exception to the general rule, that exempts the wife, and co-owner of record, of a shareholder from the

protection of the Securities and Exchange Act, *supra.* Undersigned has not located any provision in said law the exclude persons like petitioner herein from the protections of the law.

There are public policy considerations to bar respondent from stating a position before a federal agency, and stating another before a state court undersigned thinks this is a matter of national importance for the public policy of truthfulness and transparency in corporate governance, that is why I reiterate the applicability of the doctrine of estoppel, because it has its roots in public policy considerations.

It is our position that the doctrine of *estoppel*, is applicable to the case at bar, and that it arises from the statements made by respondent to the SEC (through Puerto Rican Cement). The facts of this case also justify the application of another doctrine from the Anglo-American common law, but also has roots in Roman law: *nemo auditur suam turpitudinem allegans, nemo of improbitate sua consequitur actionem* " I will not hear the one who alleges his own turpitude, not of his *improbitas* to pursue a cause of action ", included, among others as far as Puerto Rican case law is concerned, in the cases of *Rubio Sacarello v. Roig*, 84 D.P.R.344 (1962) and *Serra v. Salesian Society*, 84 D.P.R.322 (1962).

In case of *Rubio, supra,* the Supreme Court of Puerto Rico made reference to this doctrine from a quotation of Lord Mansfield, in footnote number 13, which although does not quote directly from it, refers to the case of *Holman v. Johnson,* 1775, 1 Cowp 341, 343, 98 English Reports (Full Reprints) 1120, in which the mentioned chancellor of England, Lord Mansfield, expressed the following:

> ***'The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy; which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man***

> ***who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted.*** It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, *potior est conditio defendentis*.'
>
> (Emphasis added)

From the quotation of Lord Mansfield it is clear that in situations like one at bar, considerations of public policy are paramount, and it is bearing in mind them and not for the sake of either party that court denies a cause of action or defense to a party: in this case, herein respondent.

In San Juan, Puerto Rico, August_15, 2006

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APPENDIX:

SECTION I: Full text of statutory provisions.

15 USCS § 78b

§ 78b. Necessity for regulation

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

§ 78ff. **Penalties**

(a) Willful violations; false and misleading **statements.** Any person who willfully violates any provision of this title (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any **statement** in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration **statement** as provided in subsection (d) of section 15 of this title [15 USCS § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation thereof or to become associated with a member thereof, which **statement** was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation

if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o(d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal **penalty** for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, **stockholders,** employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be fined not more than $ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or **stockholder** of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

15 USCS § 78n

§ 78n. Proxies

(a) Solicitation of proxies in violation of rules and regulations. It shall be

unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title [15 USCS § 78l].

(b) Giving or refraining from giving proxy in respect of any security carried for account of customer.

(1) It shall be unlawful for any member of a national securities exchange, or any broker or dealer registered under this title, or any bank, association, or other entity that exercises fiduciary powers, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to give, or to refrain from giving a proxy, consent, authorization, or information statement in respect of any security registered pursuant to section 12 of this title [15 USCS § 78l], or any security issued by an investment company registered under the Investment Company Act of 1940, and carried for the account of a customer.

(2) With respect to banks, the rules and regulations prescribed by the Commission under paragraph (1) shall not require the disclosure of the names of beneficial owners of securities in an account held by the bank on the date of enactment of this paragraph [enacted Dec. 28, 1985] unless the beneficial owner consents to the disclosure. The provisions of this paragraph shall not apply in the case of a bank which the Commission finds has not made a good faith effort to obtain such consent from such beneficial owners.

(c) Information to holders of record prior to annual or other meeting. Unless proxies, consents, or authorizations in respect of a security registered pursuant to section 12 of this title [15 USCS § 78l], or a security issued by an investment company registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], are solicited by or on behalf of the management of the issuer from the holders of record of such security in accordance with the rules and regulations prescribed under subsection (a) of this section, prior to any annual or other meeting of the holders of such security, such issuer shall, in accordance with rules and

regulations prescribed by the Commission, file with the Commission and transmit to all holders of record of such security information substantially equivalent to the information which would be required to be transmitted if a solicitation were made, but no information shall be required to be filed or transmitted pursuant to this subsection before July 1, 1964.

(d) Tender offer by owner of more than five per centum of class of securities; exceptions.

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title [15 USCS § 78l], or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title [15 USCS § 78l(g)(2)(G)], or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title [15 USCS § 78m(d)], and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the

issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are

taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security--

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Untrue statement of material fact or omission of fact with respect to tender offer. It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) Election or designation of majority of directors of issuer by owner of more than five per centum of class of securities at other than meeting of security holders. If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title [15 USCS § 78m(d)], any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to

all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

(g) Filing fees.

(1) (A) At the time of filing such preliminary proxy solicitation material as the Commission may require by rule pursuant to subsection (a) of this section that concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all the assets of a company, the person making such filing, other than a company registered under the Investment Company Act of 1940 [15 USCS §§ 80a-1 et seq.], shall pay to the Commission the following fees:

(i) for preliminary proxy solicitation material involving an acquisition, merger, or consolidation, if there is a proposed payment of cash or transfer of securities or property to shareholders, a fee at a rate that, subject to paragraphs (5) and (6), is equal to $ 92 per $ 1,000,000 of such proposed payment, or of the value of such securities or other property proposed to be transferred; and

(ii) for preliminary proxy solicitation material involving a proposed sale or other disposition of substantially all of the assets of a company, a fee at a rate that, subject to paragraphs (5) and (6), is equal to $ 92 per $ 1,000,000 of the cash or of the value of any securities or other property proposed to be received upon such sale or disposition.

(B) The fee imposed under subparagraph (A) shall be reduced with respect to securities in an amount equal to any fee paid to the Commission with respect to such securities in connection with the proposed transaction under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), or the fee paid under that section [15 USCS § 77f(b)] shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection. Where two or more companies involved in an acquisition, merger, consolidation, sale, or other disposition of substantially all the assets of a company must file such proxy material with the Commission, each shall pay a proportionate share of such fee.

(2) At the time of filing such preliminary information statement as the Commission may require by rule pursuant to subsection (c) of this section, the issuer shall pay to the Commission the same fee as required for preliminary proxy solicitation material under paragraph (1) of this

subsection. (3) At the time of filing such statement as the Commission may require by rule pursuant to subsection (d)(1) of this section, the person making the filing shall pay to the Commission a fee at a rate that, subject to paragraphs (5) and (6), is equal to $ 92 per $ 1,000,000 of the aggregate amount of cash or of the value of securities or other property proposed to be offered. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to such securities in connection with the proposed transaction under section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), or the fee paid under that section [15 USCS § 77f] shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection.

(4) Offsetting collections. Fees collected pursuant to this subsection for any fiscal year shall be deposited and credited as offsetting collections to the account providing appropriations to the Commission, and, except as provided in paragraph (9), shall not be collected for any fiscal year except to the extent provided in advance in appropriation Acts. No fees collected pursuant to this subsection for fiscal year 2002 or any succeeding fiscal year shall be deposited and credited as general revenue of the Treasury.

(5) Annual adjustment. For each of the fiscal years 2003 through 2011, the Commission shall by order adjust each of the rates required by paragraphs (1) and (3) for such fiscal year to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 [15 USCS § 77f(b)] for such fiscal year.

(6) Final rate adjustment. For fiscal year 2012 and all of the succeeding fiscal years, the Commission shall by order adjust each of the rates required by paragraphs (1) and (3) for all of such fiscal years to a rate that is equal to the rate (expressed in dollars per million) that is applicable under section 6(b) of the Securities Act of 1933 [15 USCS § 77f(b)] for all of such fiscal years.

(7) Pro rata application. The rates per $ 1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $ 1,000,000.

(8) Review and effective date. In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code &. An adjusted rate prescribed under paragraph (5) or (6) and published under paragraph (10) shall not be subject to judicial review. Subject to paragraphs (4) and (9)--

(A) an adjusted rate prescribed under paragraph (5) shall take effect on the later of--

(i) the first day of the fiscal year to which such rate applies; or

(ii) five days after the date on which a regular appropriation to the Commission for such fiscal year is enacted; and

(B) an adjusted rate prescribed under paragraph (6) shall take effect on the later of--

(i) the first day of fiscal year 2012; or

(ii) five days after the date on which a regular appropriation to the Commission for fiscal year 2012 is enacted.

(9) Lapse of appropriation. If on the first day of a fiscal year a regular appropriation to the Commission has not been enacted, the Commission shall continue to collect fees (as offsetting collections) under this subsection at the rate in effect during the preceding fiscal year, until 5 days after the date such a regular appropriation is enacted.

(10) Publication. The rate applicable under this subsection for each fiscal year is published pursuant to section 6(b)(10) of the Securities Act of 1933 [15 USCS 77f(b)(10)].

(11) Notwithstanding any other provision of law, the Commission may impose fees, charges, or prices for matters not involving any acquisition, merger, consolidation, sale, or other disposition of assets described in this subsection, as authorized by section 9701 of title 31, United States Code, or otherwise.

(h) Proxy solicitations and tender offers in connection with limited partnership rollup transactions.

(1) Proxy rules to contain special provisions. It shall be unlawful for any person to solicit any proxy, consent, or authorization concerning a limited partnership rollup transaction, or to make any tender offer in furtherance of a limited partnership rollup transaction, unless such transaction is conducted in accordance with rules prescribed by the Commission under subsections (a) and (d) as required by this subsection. Such rules shall--

(A) permit any holder of a security that is the subject of the proposed limited partnership rollup transaction to engage in preliminary communications for the purpose of determining whether to solicit proxies, consents, or authorizations in opposition to the proposed limited partnership rollup transaction, without regard to whether any such communication would otherwise be considered a solicitation of proxies, and without being required to file soliciting material with the Commission

prior to making that determination, except that--

(i) nothing in this subparagraph shall be construed to limit the application of any provision of this title prohibiting, or reasonably designed to prevent, fraudulent, deceptive, or manipulative acts or practices under this title; and

(ii) any holder of not less than 5 percent of the outstanding securities that are the subject of the proposed limited partnership rollup transaction who engages in the business of buying and selling limited partnership interests in the secondary market shall be required to disclose such ownership interests and any potential conflicts of interests in such preliminary communications;

(B) require the issuer to provide to holders of the securities that are the subject of the limited partnership rollup transaction such list of the holders of the issuer's securities as the Commission may determine in such form and subject to such terms and conditions as the Commission may specify;

(C) prohibit compensating any person soliciting proxies, consents, or authorizations directly from security holders concerning such a limited partnership rollup transaction--

(i) on the basis of whether the solicited proxy, consent, or authorization either approves or disapproves the proposed limited partnership rollup transaction; or

(ii) contingent on the approval, disapproval, or completion of the limited partnership rollup transaction;

(D) set forth disclosure requirements for soliciting material distributed in connection with a limited partnership rollup transaction, including requirements for clear, concise, and comprehensible disclosure with respect to--

(i) any changes in the business plan, voting rights, form of ownership interest, or the compensation of the general partner in the proposed limited partnership rollup transaction from each of the original limited partnerships;

(ii) the conflicts of interest, if any, of the general partner;

(iii) whether it is expected that there will be a significant difference between the exchange values of the limited partnerships and the trading price of the securities to be issued in the limited partnership rollup transaction;

(iv) the valuation of the limited partnerships and the method used to determine the value of the interests of the limited partners to be exchanged for the securities in the limited partnership rollup transaction;

(v) the differing risks and effects of the limited partnership rollup transaction for investors in different limited partnerships proposed to be included, and the risks and effects of completing the limited partnership rollup transaction with less than all limited partnerships;

(vi) the statement by the general partner required under subparagraph (E);

(vii) such other matters deemed necessary or appropriate by the Commission;

(E) require a statement by the general partner as to whether the proposed limited partnership rollup transaction is fair or unfair to investors in each limited partnership, a discussion of the basis for that conclusion, and an evaluation and a description by the general partner of alternatives to the limited partnership rollup transaction, such as liquidation;

(F) provide that, if the general partner or sponsor has obtained any opinion (other than an opinion of counsel), appraisal, or report that is prepared by an outside party and that is materially related to the limited partnership rollup transaction, such soliciting materials shall contain or be accompanied by clear, concise, and comprehensible disclosure with respect to--

(i) the analysis of the transaction, scope of review, preparation of the opinion, and basis for and methods of arriving at conclusions, and any representations and undertakings with respect thereto;

(ii) the identity and qualifications of the person who prepared the opinion, the method of selection of such person, and any material past, existing, or contemplated relationships between the person or any of its affiliates and the general partner, sponsor, successor, or any other affiliate;

(iii) any compensation of the preparer of such opinion, appraisal, or report that is contingent on the transaction's approval or completion; and

(iv) any limitations imposed by the issuer on the access afforded to such preparer to the issuer's personnel, premises, and relevant books and records;

(G) provide that, if the general partner or sponsor has obtained any opinion, appraisal, or report as described in subparagraph (F) from any person whose compensation is contingent on the transaction's approval or completion or who has not been given access by the issuer to its personnel and premises and relevant books and records, the general partner or sponsor shall state the reasons therefor;

(H) provide that, if the general partner or sponsor has not obtained any opinion on the fairness of the proposed limited partnership rollup

transaction to investors in each of the affected partnerships, such soliciting materials shall contain or be accompanied by a statement of such partner's or sponsor's reasons for concluding that such an opinion is not necessary in order to permit the limited partners to make an informed decision on the proposed transaction;

(I) require that the soliciting material include a clear, concise, and comprehensible summary of the limited partnership rollup transaction (including a summary of the matters referred to in clauses (i) through (vii) of subparagraph (D) and a summary of the matter referred to in subparagraphs (F), (G), and (H)), with the risks of the limited partnership rollup transaction set forth prominently in the fore part thereof;

(J) provide that any solicitation or offering period with respect to any proxy solicitation, tender offer, or information statement in a limited partnership rollup transaction shall be for not less than the lesser of 60 calendar days or the maximum number of days permitted under applicable State law; and

(K) contain such other provisions as the Commission determines to be necessary or appropriate for the protection of investors in limited partnership rollup transactions.

(2) Exemptions. The Commission may, consistent with the public interest, the protection of investors, and the purposes of this title, exempt by rule or order any security or class of securities, any transaction or class of transactions, or any person or class of persons, in whole or in part, conditionally or unconditionally, from the requirements imposed pursuant to paragraph (1) or from the definition contained in paragraph (4).

(3) Effect on Commission authority. Nothing in this subsection limits the authority of the Commission under subsection (a) or (d) or any other provision of this title or precludes the Commission from imposing, under subsection (a) or (d) or any other provision of this title, a remedy or procedure required to be imposed under this subsection.

(4) Definition of limited partnership rollup transaction. Except as provided in paragraph (5), as used in this subsection, the term "limited partnership rollup transaction" means a transaction involving the combination or reorganization of one or more limited partnerships, directly or indirectly, in which--

(A) some or all of the investors in any of such limited partnerships will receive new securities, or securities in another entity, that will be reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A [15

USCS § 78k-1]; (B) any of the investors' limited partnership securities are not, as of the date of filing, reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A [15 USCS § 78k-1];

(C) investors in any of the limited partnerships involved in the transaction are subject to a significant adverse change with respect to voting rights, the term of existence of the entity, management compensation, or investment objectives; and

(D) any of such investors are not provided an option to receive or retain a security under substantially the same terms and conditions as the original issue.

(5) Exclusions from definition. Notwithstanding paragraph (4), the term "limited partnership rollup transaction" does not include--

(A) a transaction that involves only a limited partnership or partnerships having an operating policy or practice of retaining cash available for distribution and reinvesting proceeds from the sale, financing, or refinancing of assets in accordance with such criteria as the Commission determines appropriate;

(B) a transaction involving only limited partnerships wherein the interests of the limited partners are repurchased, recalled, or exchanged in accordance with the terms of the preexisting limited partnership agreements for securities in an operating company specifically identified at the time of the formation of the original limited partnership;

(C) a transaction in which the securities to be issued or exchanged are not required to be and are not registered under the Securities Act of 1933 [15 USCS §§ 77a et seq.];

(D) a transaction that involves only issuers that are not required to register or report under section 12 [15 USCS § 78l], both before and after the transaction;

(E) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, involving the combination or reorganization of one or more limited partnerships in which a non-affiliated party succeeds to the interests of a general partner or sponsor, if--

(i) such action is approved by not less than 66 2/3 percent of the outstanding units of each of the participating limited partnerships; and

(ii) as a result of the transaction, the existing general partners will receive only compensation to which they are entitled as expressly

provided for in the preexisting limited partnership agreements; or

(F) a transaction, except as the Commission may otherwise provide by rule for the protection of investors, in which the securities offered to investors are securities of another entity that are reported under a transaction reporting plan declared effective before the date of enactment of this subsection by the Commission under section 11A [15 USCS § 78k-1],

if--

(i) such other entity was formed, and such class of securities was reported and regularly traded, not less than 12 months before the date on which soliciting material is mailed to investors; and

(ii) the securities of that entity issued to investors in the transaction do not exceed 20 percent of the total outstanding securities of the entity, exclusive of any securities of such class held by or for the account of the entity or a subsidiary of the entity.

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 81--SUPREME COURT

Sec. 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ
of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

L.P.R.A. § 2091 (2004)

§ 2091. Testimony or statement of authenticity--Concept; restrictions;

extent of notarial responsibility

The document through which a notary, at the request of an interested party, may notarize a non-original document, in addition to the date of the testimony:

(1) Of the legality of the signatures appearing therein, provided it does not deal with acts included in subsections (1) through (6) of § 3453 of Title 31;

(2) of having taken a sworn statement;
(3) of it being a true and exact translation of another document, provided he/she has knowledge of both languages and it is thus certified by the statement itself;

(4) of it being a true and exact copy of a document not found in a Notarial Protocol, or

(5) in general, of the identity of any object or thing, be it called testimony or declaration of authority.

The notary shall, at the request of the interested parties, certify in a deed other than the original, the legality of the signatures appearing thereon, provided this does not concern the acts comprised in subsections (1) to (6) of § 3453 of Title 31 in effect, which is a translation or a true and exact copy of any deed not in his/her protocol, or in general, of the identity of any object or thing.

Only the notaries shall give testimony of the facts, acts or contracts of mere specific interest without prejudice of the provisions of any of the laws in effect. The statements of authenticity may or may not be part of the oath.

Notaries shall not authenticate testimonies in comprised included in § 2005 of this title, nor in subsections (1) to (6) of § 3453 of this title. This prohibition specifically includes sales contracts of real property that expressly or implicitly intend to adjudicate specific portions of real property whose segregation has not been previously approved by the corresponding agencies.

The notary does not assume any responsibility for the contents of the private document whose signature he/she authenticates.

SECTION II: Documents from the courts below:

Except for the Resolutions of the Supreme Court of Puerto Rico, all other documents were translated by undersigned, since the Clerk of the Supreme Court informed that she did not have the resources to make the translations.

1.- Resolution denying certiorari

2.- Resolution denying first motion for reconsideration

3.- Resolution denying second motion for reconsideration.

4.- Entry of resolution denying second motion for reconsideration.

5.- Second Motion for Reconsideration

6.- Petition for Certiorari, Corrected Appendix

7.- Judgement Court of Appeals

8.- Judgment Court of First Instance

9.- Reply to Motion for Summary Judgment

IN THE SUPREME COURT OF PUERTO RICO

Jo Ann Crossley,

Petitioner

CERTIORARI

v. No. CC-2005-1114

Herman Ferrer [*sic*] Roig,

Respondent

RESOLUTION

San Juan, Puerto Rico, March 3, 2006

The petition for certiorari filed by petitioner Jo Ann Crossley is denied.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justice Rebollo López took no part in the decision.

(Sgd.) *A. I. Oquendo*
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Jo Ann Crossley,

Petitioner

v. No. CC-2005-1114

Hernán [*sic*] Ferré Roig,

Respondent

RESOLUTION

San Juan, Puerto Rico, April 7, 2006

The First Motion for Reconsideration filed by petitioner is denied.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justice Rebollo López took no part in the decision.

(Sgd.) *A. I. Oquendo*
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

Jo Ann Crossley,

Petitioner

v. No. CC-2005-1114

Herman Ferré Roig,

Respondent

RESOLUTION

San Juan, Puerto Rico, May 12, 2006

The Second Motion for Reconsideration filed by petitioner is denied. Petitioner must abide by this decision.

It was so agreed by the Court and certified by the Clerk of the Supreme Court. Justice Rebollo López took no part in the decision.

(Sgd.) A. I. Oquendo
Aida Ileana Oquendo Graulau
Clerk of the Supreme Court

COMMONWEALTH OF PUERTO RICO (unofficial translation)
GENERAL COURT OF JUSTICE
SUPREME COURT

JO ANN CROSSLEY PETITIONER

VS

FERRÉ ROIG, HERMAN
RESPONDENT

Civil Action or Crime:No. CC2005-1114 ORIGINAL CASE: FAC1999-0621 Civil Action, APPEAL CASE: KLAN200500336

NOTICE

I notify that in relation to the Second Motion for Reconsideration, the Court issued the attached Resolution:

Santiago Vela, Francisco, Esq
P.O. Box 9024226
San Juan PR 00921
Trujillo González, Maximiliano, Esq.
P.O. Box 9481
Bayamón, PR 00960
Santiago Hernández, Pablo J., Esq.
P.O. Box 9024226
San Juan, PR 00921

In San Juan, Puerto Rico, May 15, 2006

Aida I. Oquendo Graulau
Clero of the Court

Bethzaida Torres Morales (initials)
Assistant Clerk

COMMONWEALTH OF PUERTO RICO
SUPREME COURT OF PUERTO RICO

JO ANN CROSSLEY **Civil Núm. CC-05-1114**

Claimant - petitioner

VS **Matter: Certiorari**

HERMAN FERRE ROIG

Appealed defendant

THE SECOND MOTION FOR RECONSIDERATION

TO THE HONORABLE COURT:

THERE APPEARS the part claimant - petitioner JO-ANN CROSSLEY, through his lawyer who signs and very respectfully IT EXPRESES, ALLEGES AND REQUESTS:

1.-This Honorable Court DENIED the first Motion of Reconsideration presented by this part, by resolution notified on April 11, 2006, so that the termof three days to present the present motion extends up to today, due to the holidays in the interval of days up to the present.

2.-In this Motion only we are going to allude to a seminal fact and his patrimonial consequences:

First: the first 10 shares of Ponce and Panama Marine Co. they were bought by the defendant appeallant by the check number 72/55 of November 10, 1972 from his personal account with Citibank NA, in favor of Transworld Investments, Inc., for the sum of 21,000.00 $. Corrected appendix page 223.

Second: Mr. Herman Ferré Roig did not have sufficient funds in his account to cover this check, since at the time of cashing check 72/55 it only had a balance 3,034.04 $. Nevertheless, the Citibank chose to pay the check with an overdraft for 17,965.96 $. Statement of account of Citibank, page 224 of the corrected Appendix.

Third: mister Hermán Ferré Roig covered later his overdraft in his personal account, with a check for 21,000.00 $ drawn from an account in Bánco Crédito y Ahorro Ponceño of his exclusive corporation Sound Investments, Inc., charged on November 29, 1972, but the shares kept on belonging to Don Herman Ferré Roig, as it appears in all the documents mentioned in the previous writings. As a matter of fact, Sound Investments, Inc. does not appear as shareholder in the reports to the SEC. Corrected appendix: pages 226-266.

3.-The Civil Code, in its article 1,679, 31 LPRA 4681 he{she} arranges that " The depositor is forced to reimburse to the treasurer the expenses that it has done for the conservation of the deposited thing and to indemnify for all the damages that have befallen him on account of the deposit. "

The personal checking account of Don Herman Ferré, was an account of bank deposit, for what, on having produced to him the overdraft, what the bank did was to loan him money to Don Herman Ferré ***for the quantity that it did not have in deposit at the moment the check was presented for collection.***

On the other hand, this overdraft - deposit was a community community property obligation because " They Will be of charge of the company of joint property: (1) All the debts and obligations contracted during the marriage married couple ... " Article 1,308 of the Civil Code, 31 LPRA 3661.

On the other hand " They are community properties: (1) acquired by onerous title during the marriage ***at the expense of the common***

assets, whether he acquired it for the community, or acquired for only one of the spouses. "

Certainly that the portion in overdraft of the purchase of the shares, that is to say the sum 17,965.96 $ was a debit of the conjugal partnership, *ergo* what was bought with the above mentioned sum was community **although it had been acquired only for Don Herman Ferré.**

4.-The sum of 17,965.96 $ represent 85.7 % of 21,000.00 $ of the price of 10 shares, and since the whole of shares of Ponce and Panama Marine Co. de Don Herman Ferré Roig they were 20, 17,965.96 $ represent 42.85 % of the shares of Ponce and Co Marinates Panama., that are community properties.

The shares of Ponce and Panama Marine Co., they were converted into shares of BRIM, Inc., on having produced to him the transaction between the members of the Ferré family: the group of Don Luis A. Ferré and the group of Don Herman Ferré Roig.

Therefore, after the legal community property is liquidated between Don Herman Ferré Roig, here defendant petitioner and Mrs Jo-Ann Crossley, it is inescapable to divide that one 42.85 % of the community shares between two, therefore it corresponds to each one 21.42 % of the shares of BRIM, Inc.

It is inescapable, mathematically, that there be awarded to Mrs. Crossley 21.42 % of the shares of BRIM, Inc. and there is no reason in law not to do that.

5.-In this Motion the undersigned has left aside any other consideration under the article 7 of the Civil Code, and the doctrines of equity and general principles of the law argued previously. This raised matter must be viewed as of strict law, merely arising from the provisions of the Civil Code, not from commutative justice, nor

from distributive justice, nor much less from social justice but simple justice and plainly of "legal" justice, according to the thomistic classifications, still underlying in our law and in our culture.

WHEREFORE it is request from Honrable Tribunal that it RECONSIDERS its DECISION OF " DENYING THE PETITION" in this case and awards to the plaintiff petitioner 21.42 % of the shares of BRIM, Inc. In the alternative it is requested, that IT returns the present case with instructions to the court of instance or to the Center of Mediation of Conflicts, with other pronouncements that in law or equity, proceed.

In Bayamón, Puerto Rico on April 18, 2006.

I CERTIFY that today I am sending copy of the present written to the Lcdos. Pablo J. Santiago Hernández and Francisco Santiago Vela, P.O. Box 9024226, San Juan, PR 00902-4226.

MAXIMILIANO TRUJILLO GONZALEZ
Bar number #5573
P.O. Box 9481
Bayamón, Puerto Rico 00960
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COMMONWEALTH OF PUERTO RICO
SUPREME COURT OF PUERTO RICO

JO ANN CROSSLEY **Civil Núm. CC-05-1114**

Claimant - petitioner

VS **Matter: Certiorari**

HERMAN FERRE ROIG

Appealed defendant

PETITION FOR CERTIORARI, CORRECTED APPENDIX

TO THE HONORABLE COURT:

THERE APPEARS the party claimant - petitioner JO-ANN CROSSLEY, through his lawyer who signs and very respectfully EXPRESSES, ALLEGES AND REQUESTS:

1.-PARTIES: The party petitioner in this case is: Jo - Ann Crossley.

2.-JURISDICTION AND VENUE: This writ is requested pursuant to the provisions of article 3.001 (d) of the Law Núm. 201 of August 22, 2003.

3.-APPEALED JUDGMENT:

The Honorable Court of Appeals, Judicial Region of Carolina, pronounced judgment in the case *Jo-Ann Crossley v. Herman Ferré Roig*, on October 13, 2005, by means of the Judgment, the above mentioned instrument was entered on October 19, 2005.

4.-BRIEF STATMENT OF FACTS:

Introduction in relation to the parties in the present case:

The parties were married from 1971 until 1999. The petitioner was born in Bermuda and grew up in the United States, his principal language of communication is English, although she understands substantially Spanish. The appellee was born and grew up in Puerto Rico.

The petitioner, besides her children, has no relatives in Puerto Rico, except her mother who is in bed, with special circumstances. One of her three children is under-age, and one of the three also has a special circumstance.

In the middle of this picture, and being provided exclusively with the payments that the appellee makes, it has come before the doors of this Honorable Court so that the same one considers her case. She does not ask for compassion, but for justice, and her case should be analyzed in all this context.

At [the Court of First] Instance the decision was made on the records, as no testimonies were taken from the parts, both understood it unnecessarily and this way the case was submitted.

The party petitioner, requests, respectfully that, in spite of the heavy calendar that this Honorable Court has before it for consideration, that it may chooses to exercise its discrsion and to adjudicate the present case on its merits. We understand, respectfully, that, considering the circumstances of this case, it is not much to ask.

Introduction on the appeals:

The case of cars, begun at First Instance the year 1999, has been the object of two procedures on appeal, the appealed judgment

corresponds to this second procedure, which received the number KLAN 0500336, in relation to the judgment earlier mentioned.

In case at bar an appeal was previously filed under the number KLAN 200301451, in relation to the Resolution and Partial Judgment issued on November 24, 2003. The case was returned to the Court of the First Instance for having held this Honorable Court that was not there was not a final judgment, it considered the Petition as a certiorari, said Honorable Court declined to exercise its optional jurisdiction.

Facts of the case in the Court of the First Instance:

The parties in this case married on June 2, 1971 and obtained judgment of divorce, emitted by the Court of the First Instance, Carolina's Section, on October 18, 1999.

The complaint in the present case was filed on October 22, 1999.

After diverse steps, the presente case was set for Pre Trial Conference, the same one took place, and a supplemental on wass prepared an Amended Report on Preliminary Conference between Lawyers (filed on July 3, 2003) on November 24, 2003.

The defendant presented a Motion of Summary Partial Judgment on July 1, 2003, and the claimant presented her Reply to Motion of Summary Judgment on October 9, 2003 (after having reported to the Honorable Court about a trip in July). The reply was presented after an additional term was requested and obtained from the Honorable Court, nevertheless, the court *a quo* considered same

The trial in this case was set for the 8th and 9th of December de2003.

On December 1, 2003 a Resolution and Partial Judgment was

received in the office of undersigned, enterede on November 26, 2003, which was the object of appeal in this case, *supra.*

After diverse procedural steps, the Court of the First Instance entered again judgment, which is an object of the present action, on January 27, 2005, in it, it decided again against the petitioner and in favor of the appellee.

The party claimant - petitioner DOES NOT AGREE WITH THE ISSUED JUDGMENT, so the second appeal was filed.

The Court of Appeals decided against petitioner herein, for that this this petitition for certiorari is filed.

5.- STATEMENT OF ERRORS.

A. THE HONORABLE COURT OF APPEALS ERRED BY IGNORING AND THEREFORE NOT HAVING APPLIED TO THE CASE AT BAR , THE DOCTRINES OF THE " ONE'S OWN ACTS " AND OF " NEMO AUDITUR SUAM TURPITUDINEM ALLEGANS " AND COLLATERAL ESTOPPEL BY JUDGMENT, ESTABLISHED BY THE JURISPRUDENCE OF THIS HONORABLE COURT AND ERRED BY IGNORING THE AFFIDAVITS OF THE RESPONDENT AGAINST HIS OWN INTEREST.

B. THE HONORABLE COURT OF APPEALS ERRED AFTER SINCE IT DID NOT APPLY TO THE CASE AT BAR THE DOCTRINE OF *MONTALVAN. NAVARRO RODRÍGUEZ,* 2004 TSPR 42.

C. - THE HONORABLE COURT OF APPEALS ERRED IN DECIDING THAT IT HAD TO GIVE DEFERENCE (TO THE COURT OF FIRST INSTANCE) IN THE APPRECIATION OF THE EVIDENCE TO THE COURT OF INSTANCE, WHEN *ALL THE EVIDENCE IS DOCUMENTARY.*

6.-DISCUSSION OF THE SPECIAL ERRORS

A. THE HONORABLE COURT OF APPEALS ERRED BY IGNORING AND THEREFORE NOT HAVING APPLIED TO THE CASE AT BAR , THE DOCTRINES OF THE " ONE'S OWN ACTS " AND OF " NEMO AUDITUR SUAM TURPITUDINEM ALLEGANS " AND COLLATERAL ESTOPPEL BY JUDGMENT, ESTABLISHED BY THE JURISPRUDENCE OF THIS HONORABLE COURT AND ERRED BY IGNORING THE AFFIDAVITS OF THE RESPONDENT AGAINST HIS OWN INTEREST.

The present litigation is one for the liquidation the legal conjugal partnership of joint property formed by Don Herman Ferré Roig and Mrs{Ms} Jo-Ann Crossley, who was constituted after both married on June 2, 1971.

It is the position of the part claimant - petitioner that all the properties acquired during the marriage by both parties are community property.

The part claimant - petitioner does not have in her possession the records of the substantial property, and of the obligations of the legal conjugal partnership of joint property, since all the records were kept in the offices of Don Herman Ferré Roig, and they remain there.

Nevertheless the party claimant - petitioner presented in her Reply to Summary Judgment, the following documents:

1.-Cheque drawn against First National City Bank (today Citibank) for the acquisition of shares of Ponce and Panama Marinates Co. Appendix, page 110.

2. Statement of account of First National City Bank that indicates the payment of the check, in overdraft. Appendix 111.

3. Documents of records of the Securities and Exchange Commission. Appendix, pages 113-152.

4.-Complaint of Don Herman Ferré, Mrs Jo-Ann Crossley and their conjugal partnership of joint property against the group of Don Luis Ferré, SuperiorCourt of Puerto Rico. Appendix, pages 54-55.

5.-Complaint of Don Herman Ferré, Mrs{Ms} Jo-Ann Crossley and his conjugal partnership of joint property against the group of Don Luis Ferré, Court of Panama. Appendix, page 56-61.

6.-Affidavit of Don Herman Ferré Roig before the Public Notary Miguel Pascual Esteban, of April 17, 1986, Affidavit number 22123. Appendix, page 37.

The party claimant - petitioner rests in the presumption of law that provides that the property of the parties in this case, acquired after the marriage are community property, and that the *onus* of the proof to demonstrate that some property is exclusive falls on that part that claims it. Article 1,307 of the Civil Code, 31 LPRA 3647.

As for the principal assets of the parties, which constitute the funds from the proceeds of the sale of the shares of Puerto Rican Cement Co., the defendant is barred by his own acts from denying the community property character of the above mentioned assets, since the shares of Puerto Rican Cement Co. have been possessed by both parties through several such corporations as Ponce and Co Marine Panama. (Panamanian entity) and up to the present by BRIM Corp. (Puerto Rican entity) that received them from Ponce and Panama Co Marines. In litigations had between several groups of shareholders of the Ferré family, Don Herman Ferré Roig claimed that the shares of

Ponce and Panama Co. Marine they were a community property property of the parties here appearing. This happened in a case litigated before the Superior Court of Puerto Rico, and in another before the courts of Panama. The contradictory conduct is inadmissible in law.

Also the first shares of Ponce and Panamá Marine Panama they were bought through the use of an account of the legal conjugal partnership of joint property in First National City Bank, which purchase produced a community property debt: an overdraft in the above mentioned account, since the bank paid the check for the purchase that temporarily did not have sufficient funds. The overdraft was covered with a check of Sound Investment Corp., corporation possessed by Don Herman Ferré Roig.

In relation to the legal information about title to the shares of Puerto Rican Cement Co., Don Herman Ferré submitted information (for himself and/or by means of his lawyer, Lcdo. Miguel Pascual Esteban) so that Puerto Rican Cement Co was informing the Security and Exchange Commission who were, for the diverse periods, who the shareholders of Puerto Rican Cement Co were. In the above mentioned Report it is stated that the wife of Don Herman Ferré Roig is a co-shareholder the wife of Don Herman Ferré Roig that for the informed periods she was the claimant Jo-Ann Crossley (pages 121, 142 of the Appendix).

Finally, Don Herman Ferré, in affidavit of April 17, 1986, granted before the Public Notary Miguel Pascual Estebán on April 17, 1986, under the testimony number 22123, declared under oath that here claimant was also a proprietor of the shares here in controversy, that are not only those of BRIM, Corp., but they are those of Ponce and Panama Marine (10 of the shares, presumably acquired with an exchange of real estate), the shares of Ferré Development, Inc., the shares of Sound Investment, Inc., the shares of Sanber Investment S.A., in the percentages and numbers that are described in the

affidavit. (Appendix, page ___)

In the Reply presented on behalf of the defendant Herman Ferré Roig, did not controvert with another affidavit what mister Ferré declared under oath in 1986, there were *assertions of his lawyers, but no affidavit of mister Ferré himself.*

It is IMPORTANT DECISEVELY for the resolution of the present case that this Honorable Court distinguishes between the argumentations of the lawyer for the appellee and THE STATEMENTS OF THE APPELLE HIMSELF, both in his affidavit, and in the presentation of the reports to the Securities and Exchange Commission. The argumentations of law, of the lawyer for the appellee, like the contained ones in the appealed judgment, are PROFESSIONALS' EXPRESSIONS OF THE LAW THAT INTERPRET A FEW FACTS, the statements of the appellee ARE UNCONTROVERTED. This Honorable Court should note that, if the appellee in this case had made an affidavit denying the community property character of the shares object of the present litigation he might have committed perjury, since he would have declared in a few documents the community property character of the shares of Puerto Rican Cement Co. or the co-ownership of the same ones, and in other one he would have declared that the above mentioned shares were exclusive. But the appellee HAS INCURRED NO POTENTIAL PERJURY BECAUSE IT HAS NEVER CONTRADICTED IN THIS CASE HIS PREVIOUS STATEMENTS.

Neither the lawyers of the appellee, nor his accountant, although they characterize the shares in controversy as exclusive, can contradict the own expressions under oath of the appellee. The statements of appellee on the community property character and/or co-ownership of the shares of Puerto Rican Cement Co.

THEY CONSTITUTE AN UNCONTROVERTED FACT-

The problem that the judgment issued on appeal raises, as well as the one on First Instance is that THEY IGNORE THE STATEMENTS OF THE APPELLEE

May a person declare something under oath, and later try to affirm the proposition of which the above mentioned statement is a lie, nor make another sworn counteraffidavit? The response is NO, AND THAT'S WHY DON HERAMN FERRÉ DID IT.

Neither can now the lawyers and the accountant of Don Herman Ferré allege that the information is not correct, that Don Herman himself provided the Securities and Exchange Commission under oath. This assertion and the pretension of exercising a cause of action are barred by the doctrine of *nemo auditur suam turpitudinem allegans,* recognized current in our right in case of *Fair-haired Sacarello v. Roig,* 84 DPR 344. And also, because Don Herman himself NEVER has contradicted, by means of other affidavits or by means of testimony in open court, his previous written statements.

For its part, the article 1,301, 31 LPRA 3641, provides the community property character of all the property acquired by any of the spouses, through onerous title, during the marriage; the property obtained by concept of industry, salaries or work of the spouses; and the fruits of the community properties as well as from the exclusive ones. The civil fruits of the chattel and real estate that could be considered to be exclusive of Don Herman, are still community property and they include the rent of leases received, perpetual, life revenues or similar others as dividends, loans in replacement of dividends, interests and appreciation of the property, both community and exclusive of the two spouses. Article 289 of the Civil Code, 31 LPRA 1142. The judgment issued in this case, in all

his arithmetical operations, ignores completely this precept and DOES NOT GRANT ANYTHING TO THE PETITIONER IN CONCEPT OF CIVIL FRUITS (see the next controversial error, *infra)*, still assuming the erroneous position of which the shares of Puerto Rican Cement Co. were exclusive. Position that the defendant-appellee, Don Herman Ferré HAS NEVER ENDORSED WITH A CONTRADICTORY AFFIDAVIT.

The article 1,307, 31 LPRA 3647, it establishes the presumption and change in the weight of the test, which he{she} provides that all the property of the marriage is reputed joint property, unless specifically it is specifically proven that it belong to the husband or to the wife.

The article 1,203, 31 LPRA 3342 provides the presumptions of law, like the one established by the article 1,307, supra, "excuse of any proof to those favored by same". For it the plaintiff only has to indicate the propery belong to the conjugal partnership and request the half of same, or its equivalent value.

Even though the doctrine of res judicata is not applicable to the facts of the present case applies the **doctrine of collateral estoppel by judgment** to the jugdement that was issued (by stipulation) in the litigation in Puerto Rico between the members of the Ferré family, *supra*, in relation to the shares of Ponce and Panamá Marine Co, that they were joint property of Don Herman and Mrs Jo-Ann.

It turns out to be surprising, the expressions of the Honorable Court *a quo* in its judgment that they allude to certain documents of the case between the group of Don Luis Ferré and the group of Don Herman Ferré, in relation to whom in several documents one alludes to " the claimant ". What counts in order to determine the nature of the action before the San Juan Section of the Court of the First Instance, that are the substantive allegations, in which it is stated:

First in the caption: " HERMAN FERRÉ, JR; JO-ANN FERRÉ and the Conjugal Partnership by them constituted: Claimants "

Second in the text:

" 1. That the claimants and the defendants, are shareholders of the following companies:

a. Ponce and Panama Marine, S.A.
b. C.A. Factoría Nacional de Vidrio
c. Produvisa
d. Papelera Nacional, Inc.
e. Sanber Investments, Inc.
f. Investments Ferré, Inc. "

(Page 54 of the appendix).

The inescapable conclusion to which any prudent and reasonable man would come to, of the expressions of the Honorable Court of Instance the fact is that it neither matters ABSOLUTELY to identify a person as claimant, also NOTHING MATTERS ABSOLUTELY AT ALL the allegations of the Complaint. If this were the case, all the rules and instructions that this Honorable Court has established for the identification of the parties in the litigations would be UNNECESSARY. As example: the rules provided in the Regulation that regulates the procedures of the Court of Appeals, and that contains a specific regulation for the suitable identification of the parties, ***in the caption,*** as well as in the cover of the briefs requesting writs to this one Honorable Superiority.

The claimant - petitioner was a part in the suit *Herman Ferré, Jr; Jo Ann Ferré and the Legal Conjugal partnership of Joint property for them constituted v. Luis A. Ferré, Antonio Luis Ferré and Rosario J. Ferré, Civil Núm. 85-6252 (902)* in the same one that judgment was entered, including to herein petitioner [with respect

to] the shares of the diverse corporations, which were holders of shares of the Puerto Rican Cement Co. (as Ponce and Panama Marine) and which assets were transferred to BRIM, Corp.

The doctrine of collateral estoppel by judgment has several intentions, among them, that a party **does not have to prove again a few facts adjudicated by judgment.** This was held in the case of *Rodríguez v. Colberg Comas, 131 DPR 212 (1989):*

> "the doctrine of res judicata as well as its another mode **collateral estoppel they** have the intentions of protecting the litigants against what it represents to defend itself or to prove his claims in repeated occasions about the same controversy; to promote the judicial and administrative economy to avoid unnecessary litigations and to avoid inconsistent decisions."

One of the cases in which the case law on the doctrine of collateral estoppel by judgment is summarized is: ***A and P Gen. Contractors, Inc. v. Asociación Caná, Inc., 110 D.P.R. 753 (1981)***

In the above mentioned case the "offensive" use of this doctrine was restated, which is the one that we are invoking in case at bar.

To the present case also apply the doctrine of one own's acts, in force in Puerto Rico as one of the general principles of the law that are recognized under provisions of article 7 of the Civil Code, 31 LPRA 7. See the case of International General Electric v. Concrete Builders, and Diez Picazo and Ponce of León, *La doctrina de los propios actos*, Bosch, Barcelona, 1963, page 151 inter alia and José Puig Brutau, *Estudios de derecho comparado,* Bosch, Barcelona, page 126 and ss.

The content of the norm that to nobody it is licit to go against his own acts has foundation and root in the general principles of law that

orders to proceed honestly in the juridical life. The contradictory conduct does not have a place in the field of the law, and must be barred. This principle has like parallel in the English Law doctrine of estoppel. N6 The typical minimal effect that must be recognized after the unilateral acts n7 is that they make an estoppel take root. This prevents the subject to which the unilateral act is attributable from being able to operate in contradiction with his stated will *International General Electric, supra*, 104 DPR, 871,874.

Even though the case law of the Supreme Court of Puerto Rico has not examined a case in which there was applied the doctrine of one's own acts to a suit of liquidation of legal conjugal partnership of joint property, the Spanish jurisprudence has indeed, held that this doctrine applies to cases of liquidation of conjugal partnerships of joint property. See, for example: the judgment of April 7, 1997, issued by the Civil Chamber of the Supreme Court of Spain, RJ 1997\2741. (Appendix pages 32-33).

In the Anglo-American common law the most proximate doctrine, in terms of his content, to the doctrine of one's own acts is the so-called " *estoppel in country* ", that *Black's Law Dictionary,* 6th. Edition, West Publishing Co, 1990, to the page 551, defines as:

> " The doctrine by which to person may be precluded by his own act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had. " (Citations omitted)

Again, by way of analogy in relation to the Anglo-American common law, the appellee, is barred by his conduct, ***and by his silence by not having presented another affidavit alleging that the shares of Puerto Rican Cement Co. (possessed first by Ponce and Panama Marinates and later for BRIM) they are his exclusive property***: from denying the allegations of community property (in the suits in Puerto Rico and Panama) and of co-ownership (in the

documents of the SEC and in his own affidavit). In this litigation, his lawyers, his book-keeper and the court *a quo* in its judgment, they have denied the above-mentioned community property character of the above-mentioned shares. The allegations of the lawyers for defendant appellee to claim in is favor a supposed condition of "exclusive" of the property in controversy, IS BARRED BY LAW.

In addition to the doctrines of the one's own acts and of *estoppel*, in case at bar the facts warrant the application of another doctrine from the Anglo-American common law, but also of Roman roots: *nemo auditur suam turpitudinem allegans. nemo of improbitate sua consequitur actionem* " I will not hear the one who alleges his own turpitude not of his *improbitas* to pursue a action ", stated among others, in thee case of *Rubio Sacarello v. Roig*, 84 D.P.R.344 (1962) and *Serra v. Salesian Society*, 84 D.P.R.322 (1962).

In case of *Rubio, supra,* this Honorable Superiority referred to this doctrine from a quotation of Lord Mansfield, in footnote number 13, which even if it does not cite directly, refers to the case of *Holman v. Johnson,* 1775, 1 Cowp 341, 343, 98 English RePuertos (Full Reprints) 1120, in which the mentioned chancellor of England, Lord Mansfield, expressed the following:

> ***' The objection that to contract is immoral or illegal expert{ace} between plaintiff and defendant sounds at all steal very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy; which the defendant are the advantage of, contrary to the real{royal} justice, expert{ace} between him and the plaintiff, by accident, if the Ist May so say. The principle of public policy is this: ' ex dolo malo non oritur actio. ' Not court will lend its aid to to man who founds his causes of action upon***

> ***an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the causes of action appears to arise ex-turpi cause, or the transgression of to positive law of this country, there the court says he has no right to be assisted.*** It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, *potior est conditio defendentis.* '
>
> (Emphasis added)

From the quotation from Lord Mansfield it is clear that in situations like the case at bar, considerations of public order are present, " public policy ", and it is bearing in mind them and not bearing in mind the adverse party, that one denies to him the cause of action or defense he would otherwise have: herein defendant appellee. The consideration of public order is the presentation of information to the Securities and Exchange Commission in which the defendant declared the shares in controversy they belonged also to his wife, and his current denial, through} his lawyers and his book-keeper, that this affirmation is not true. If it were considered that the current position is the correct one (the shares belong to the appellee defendant and not to him and to the claimant - petitioner) then the information given to the SEC was incorrect, and, therefore, USC would enter in operation the provisions of the Securities and Exchange Act of 1934, 15 U.S.C. 78ff, that provides as follows:

§§ 78ff. **Penalties**

"(a) Willful violations; false and misleading **statements.** Any person who willfully violates any provision of this title (other than section 30A [15

USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any **statement** in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration **statement** as provided in subsection (d) of section 15 of this title [15 USCS § 78o(d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which **statement** was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o(d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal **penalty** for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, **stockholders,** employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be fined not more than $ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or **stockholder** of an issuer, such fine may not be paid, directly or indirectly, by such issuer."

On the other hand, the Penal Code of Puerto Rico of 1974, was typifies as a crime the submission of false dstatements, in several forms, in its articles 225, 33 LPRA 4421 (Perjury), 271, 33 LPRA 4591 (Falsification) and 217, 33 LPRA 4392 (fraudulent Lists and other illegal acts).

: How is it possible that a court of justice protects the conduct of a litigant who informs (it alleges now incorrectly) to a public agency that certain property (shares) of him belong to he and his wife and now he says, through his lawyers and accountants, that the same ones are his only? and that he makes an affidavit in which he expresses a fact: that shares here in controversy belong also to his wife (and now it alleges, hrough his lawyers, that is not correct) because the shares belong to him exclusively? In both instances the defendant had alleged the co-ownership of the shares in controversy and now he alleges, not he, but his lawyers, that they are an exclusive property of the appellee.

Is worth while remembering the above mentioned in *International General Electric, supra:* ***the contradictory conduct is inadmissible in law.***

there cannot be any doubt that, as a matter of law, the properties of the married couple Ferré-Crossley are community property of both, in particular the shares of Puerto Rican Cement, sold to CEMEX and turned into money at the present, and other assets that are possessed through Brim Corporation and other

corporate entities both domestic and foreign.

The inescapable conclusion is that both the Court of Appeals and the Court of the First Instance IMPINGED upon the the doctrines established by the Honorable Supreme Court of Puerto Rico earlier cited: collateral estoppel by judgment, one own's acts and *nemo auditutur.* And one affected seriously to the resolover AGAINST THE NOT CONTRADICTED OWN STATEMENTS OF THE APPELEE, WHO, HE HIMSELF HAS NEVER RETRACTED FROM HIS STATEMENTS.

A court cannot determine as a fact the allegations of the lawyers and book-keepers on the one hand AGAINST THE UNCONTRADICTED EXPRESSIONS OF THE PARTY IN QUESTION.

B. THE HONORABLE COURT OF APPEALS ERRED AFTER SINCE IT DID NOT APPLY TO THE CASE AT BAR THE DOCTRINE OF *MONTALVAN. NAVARRO RODRÍGUEZ,* 2004 TSPR 42.

The case of *Montalván, supra,* compiles the scientific doctrine on the subject of legal conjugal partnership of joint property, his liquidation and the liquidation of the "post-community property" community.

Our Honorable Supreme Court, echo of the most important commentators does, Spanish as well as domestic, on the matter, and with it it compiles the scientific doctrine in this matter.

Of the opinion issued by the Honorable Judge President Federico Hernández Denton, who wrote the above mentioned opinion and judgment, the following postulates can be extracted in

conclusion:

To determine the value of the estate to split, the value of the fruits of the property must be determined, both community property and exclusive: the increase in value of the exclusive property: the civil fruits, they are community properties to divide:

> " It would take as consequence the fact that the fruits and capital revenues and work would keep on increasing the conjugal partnership and the regime} of responsibility, management and disposition would keep on being the same as previously. This thesis does not seem sustainable. There is no reason to keep on increasing the common patrimony with the revenues of the work and industry or with the revenues of capital of the goods that are common, but exclusive; and there is absent any possibility of applying the rules on management, administration and disposition to the joint property, which presupposes the subsistence of the marriage [...]. "

Therefore, assuming that the appellee was owner of the shares of Puerto Rican Cement Co, through BRIM, that now they were converted into cash due to the purchase of Puerto Rican Cement Co. by CEMEX, it would be necessary to determine the value of the shares of Puerto Rican Cement Co. that were a property of the appellee to the moment of the marriage, June 2, 1971 (through Ponce and Panama Marine SA, predecessor entity to BRIM), up to the present moment, and the increase in value would have to be split between the two former spouses, from 1971 to 1999 because of the [existence] of the legal conjugal partnership of joint property, and from 1999 to the present, because of the post-marriage community. In both cases the division is share and share alike, since any increase in value of the shares of Puerto Rican Cement between 1999 and 2004 in which they were sold at CEMEX is owed to the action of CEMEX and not to the specific and particular work of the appellee. All this by virtue of what was held in the case of *Montalván, supra.*

The entire application of the doctrine of *Montalván, supra,* to the case at bar leads to the inescapable conclusion that the shares of Puerto Rican Cement Co., that were possessed through Ponce and Panamá Marine SA before the suit between the Ferré groups, and by BRIM after the suit, are a property of the legal conjugal partnership of joint property Ferré-Crossley, for that the proceeds from the sale of the above mentioned shares and other assets bought through BRIM, they will have to be split in equal parts between the petitioner and the appellee.

Finally, if this Honorable Court does not consider applicable any doctrine relative to the own acts, at least, will have to take into account that the shares of Ponce and Panamá Marine Co. were acquired by the appellee in two halves, and the first half was the one he acquired by the check of CITIBANK, *supra,* paid in overdraft by the above mentioned bank, for what the overdraft constituted a community property debt and the property acquired by the group Ferré-Crossley was as well 50% community property in Ponce and Panama Marine, which, at least, places the petitioner with 25 % of the assets of the above mentioned Panamanian corporation which were transferred to BRIM, within which corporation there were held as assets the shares of Puerto Rican Cement and other properties.

C. - THE HONORABLE COURT OF APPEALS ERRED IN DECIDING THAT IT HAD TO GIVE DEFERENCE (TO THE COURT OF FIRST INSTANCE) IN THE APPRECIATION OF THE EVIDENCE TO THE COURT OF INSTANCE, WHEN *ALL THE EVIDENCE IS DOCUMENTARY.*

Considering the length of the present petition, briefly we will present that both the Court of Appeals, and this Honorable Court, there are in EXACTLY the same position as the Court of the First Instance to evaluate and ponder the evidence in case at bar, and that

no deference is necessary to be given for the *forum to quo,* because THE TOTALITY OF THE EVIDENCE IS DOCUMENTARY, AND THE APPELLATE FORA ARE IN EXACTLY THE SAME POSITION THAT THE COURT IS A QUO WAS IN, FOR ITS EVALUATION.

7.-REQUEST

WHEREFORE IT IS REQUESTED of the Honorable Court that IT REVOKES the judgment issued, and issue ANOTHER ONE in which it determines that the shares of Puerto Rican Cement Co., that were possessed through Ponce and Panama Marine SA before the suit between the groups Ferré, and for BRIM after the suit, are a property of the legal conjugal partnership of joint property Ferré-Crossley, as well as the proceeds from the sale of the above mentioned shares and other assets bought through BRIM, they will have to be split on equal shares between the petitioner and the appellee. ADDITIONAL ALTERNATIVE REQUEST, there be awarded to the party petitioner, at least 25 % of the assets of BRIM that originated from Ponce and Panama Marine, including 25 % of the value of the shares of Puerto Rican Cement; with other pronouncements that in law proceed.

In Bayamón, Puerto Rico on November 21, 2005.

I CERTIFY that in today I am sending copy of the present written to the Lcdos. Pablo J. Santiago Hernández and Francisco Santiago Vela, P.O. Box 9024226, Saint John, PR 00902-4226.

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Commonwealth of Puerto Rico
COURT OF APPEALS JUDICIAL REGION OF CAROLINA
Appeal from the Court of the First Instance, Superior Section of Carolina

No.KLAN0500336

JO ANN CROSSLEY

Appellant
V.
HERMAN FERRE ROIG

Appellee

MATTER: LIQUIDATION OF JOINT PROPERTY CIVIL NÚM. FAC-1999-0621

Panel formed by its president, Juez Rivera Roman, and the Judges Coll Marti and Soler Aquino, Judge who wrote for the Court.

JUDGMENT

In San Juan, Puerto Rico, on October 13, 2005.
The claimant appeals against a partial judgment issued by

the Court of the First instance on 27 of January, 2005, entered on February 16, 2005. It alleges that the above mentioned forum erred to:

1) to ignore and therefore did not apply to the case at bar, the doctrines of the "one's own acts " and of "nemo auditur suam turpitudem allegans ", and collateral estoppel by judgment, established by the case law of this Honorable Court and erred in having ignored the affidavits of the Appellee against his own interest.

2) not to apply to the case at bar the doctrine of Montalban Ruiz v.

3) Navarro Rodriguez, 2004 TSPR 42.

The appellant and the Appellee were married up to 23 of September, 1999, when the judgment of divorce was issued.

The appellant requested the division of the community property. After a protracted litigation, the appellee requested partial summary judgment, or the dismissal of the claim of claimant over the shares of BRIM Incorporado. He alleged that the above-mentioned shares were exclusively of his property, for being of absolutely exclusive character. On November 26, 2003, the Court of the First Instance received his exposition and issued a resolution and partial judgment concluding that the above mentioned shares of PR Cement, in the tenancy of BRIM, were from its origin his exclusive property. Disagreeing, appellant turned to this Court. Nevertheless, on January 27, 2004,we refused the appeal for there had not been registered and entered a final judgment It was clear that the terms of Rules 47,48 and 53 had not begun to run.

On May 13, 2004, the appellant filed a motion requesting that judgment be entered, in which she expressed that the real controversies were the ones contained in the partial judgment that had been considered as a resolution. The other matters pending consideration are related to assets in which both parties are in agreement that are community or exclusive property. The court can decide with the documentary evidence and the stipulations of facts that the parties agreed to in the Report on Pre-Trial Conference.

The Court of the First Instance concluded, after considering the documents and evidence presented by both parties, that the above-mentioned shares belonged exclusively to the Appellee. This is established by the tract of acquisition and later negotiation, in which its title of origin was kept this determination also is based on stipulations signed by both parties in the Amended Report On Preliminary conference Between Lawyers, filed on November 24, 2003, in which it is established with total clarity, the exclusive character of shares of Puerto Rican Cement Ca. possessed by BRIM. The appellant herself, in the hearing of the trial, admitted that the court could adjudicate, with the documentary evidence presented, and the stipulations of fact agreed upon in the

above mentioned report. She accepted the character and amount of assets and liabilities that are contained in the Statement of Assets and Liabilities prepared by the Certified Public Accountant, expert of the Appellee.

Also, in the Appeled judgment it is stated that this matter was clarified and acknowledged for record: (1) that the shares of BRIM were an exclusive property of defendant, since this was deduced from the stipulations of facts incorporated in the alluded Report, and that it was deduced, in addition, from the tract there to their acquisition, due to the personal title of defendant or through corporations belonging to him (2) that Aldea Development is a subsidiary company of the exclusive corporation **BRIM** and therefore exclusive property of the defendant and (3) that the quantity, title and patrimonial nature of the accounts or certificates of deposits and other property are those therein stated. See Stipulations of facts (a) up to (n) of theAmended report.

The appealed court did not find any basis in either allegation of the appellant that the appellee was barred by his own acts to deny the community property character of the shares in controversy. " Proxi statement " on which it is based, does not have the meaning claimed, since it does not recognize a community property participation in the shares of PR Cement, not to have converted them in community during the existence of the marriage. The court examined the documents offered by the claimant and in none of them the supposed claim of community property appears. Consequently, the court issued judgment of liquidation of community properties, in which it excluded from the community property the shares of PR Cement in the tenancy of BRIM, for being exclusive propertyof the Appellee. It is from this partial judgment that [she] appeals before us.

The appellant alleges that the appellee is barred by his own acts from denying the character of the above mentioned shares, since in litigations had between several groups of shareholders of the Ferré Family, [appellee] claimed that the sharesof Ponce Cement and Panama Marine were community property. Also, it raises that the Appellee acknowledged the community property character of shares by means of an affidavit.

The Court of Appeals must not intervene with the appreciation of the evidence made by the adjudicating court, when it is based on the evidence offered during trial and fully justified in the record. The determination of credibility of the adjudicating court deserves considerable deference from the appellate court. The judge of facts is, ordinarily in better position to ponder the witness testimony presented, since he (she) was the one who saw and heard the witnesses.The adjudictating judge before whom the witnesses testify is who has the opportunity to see them and to observe his(her) demeanor while testifying, of being able to appreciate his gestures, doubts, contradictions, mannerisms, doubts, hesitations and consequently of being able to form in his[her] conscience the conviction as to whether or not [the witness] is telling the truth. Hence in absence of error, passion, prejudice or bias, the appellate courts must not intervene in the appreciation of the evidence and in the adjudication of credibility by the court of instance. *Argüello López v. Argüello García, 155* D.P.R. _ (2001), 2001 J.T.S. 127.

The evidence extant in the case at bar, completely establishes, that the shares in controversy are exclusive property of the Appellee. The appellant did not present any evidence that refuted or controverted the exclusive character of same. It is not true that the appellant is barred by his own acts from denying the community character of the shares, such recognition has not been demonstrated before us. The Court of the First Instance concluded that of the evidence offered by the Appellee [appellant, error in the Spanish original], there does not arise the alleged community character of the shares. Neither exists any proof that an increase happened in value of such shares, product of the industry, salary or work of any of the spouses, which would convert it into a community property, as established in *Montalván Ruiz v. Rodriguez,* 161 D.P.R. (2004), 2004 J.T.S. 48, 2004 TSPR 42.

On the other hand, we understand that the appellant is the one who is barred by her own acts from questioning the exclusive character of these shares. The parties came to a few Stipulations which were made part of the Pre-Trial Conference Report, and that are contained in the appealed judgment, in which the appellant recognizes the exclusive character of the shares. To these effects, we allude to the pages 19 and 21

of the Appendix to the Petition of the appellant, sixth part on the Stipulations of Fact of the Amended Report on Preliminary Conference between Lawyers.

For all the reasons earlier expressed and pursuant to the stated law, the appealed judgment is confirmed.

The Court so agreed, and it is so certified by the Clerk.

Commonwealth of Puerto Rico
Court of First Instance,
Carolina Section

JO-ANN CROSSLEY Civil No. FAC 1999-0621(401)

Claimant Matter: Liquidation of Conjugal Partnership

VS

HERMAN FERRÉ ROIG

Defendant

Judgment

The marriage between the above captioned parties was dissolved by means of judgment of divorce on September 23, 1999. The claimant, .Jo- Ann Crossley, initiatedthis action on October 22, 1999 to request the liquidation of the of conjugal partnership of join propertyconstituted with the defendant, Herman Ferré Roig, and, therefore, the distribution of the property held by the above mentioned conjugal partnership.

After an extensive process during which the parties exchanged information and documents, they tackled discovery of evidence, and discussed the possibility of achieving a setlement agreement, on the 1st. of July, 2003, defendant filed a motion entitled : *Motion for Partial Summary Judgment or for Dismissal of the Claim of the Claimant on Shares of B.R.I.M. Incorporated for it is an Inappropriate Claim as a Matter of Law.*

By means of the above mentioned request, defendant opposed the theory in the allegations of claimant to the effect that one of the principal assets of the defendant, shares of capital of Puerto Rican Cement Company, held by B.R.I.M. Incorporated a corporation of which the defendant has been the sole shareholder, were community property. -

Concretely, the claimant argued that in litigations had between several groups of shareholders of the Ferré family , the defendant " *claimed* " that the shares of Port Rican Cement Company in the tenancy of Ponce and Panama Marine Company (acquired later by B.R.I. M. Incorporated) were a community property of the parties. Based on this premise, the claimant argued that the defendant was *estopped* from denying the community property character of the above mentioned shares by operation of the doctrine of one's own acts, by the defense of collateral estoppel by judgment, and by the principle to which he must not be listened in judgment opinion who alleges its own turpitude.

After considering the reply presented by the claimant opposing the request of the defendant, as well as a surreply to the above mentioned reply presented by the latter, we resolved, as at to the only aspect to which was directed the motion of summary judgment, that. in effect. the above-mentioned shares belonged exclusively to the defendant since the tract of acquisitionand laternegotiation - maintained his title of origin invariable.

By means of Resolution and Partial Judgment notified on November 26, 2003. the Court, for it was hit in his analysis, persuasiveness in his argumentation and correct in his conclusions of law, adopted the exposition and essentials of the motion for partial summary judgment of the defendant, determining that the above mentioned shares of Puerto Rican Cement in the tenancy of B.R.I.M. Incorporated were, from his origin, and through his subsequent negotiations, exclusive patrimony of the defendant, HermanFerré Roig.

On November 24, 2003. two days before the above-mentioned resolution and judgment was notified (that was appealed then by the claimant before the Court of Appeals), the parties presented to the Clerk of the Court an extensive and detailed Amended Report On Preliminary Conference Between Lawyers.

The stipulations signed by the parties in the above mentioned report establish with entire clarity the exclusive character of the shares of Puerto Rican Cement Co. possessed by B.R.I.M. Incorporated. giving validity and confirming in this way to the conclusions of the appealed resolution

Only three days before the celebration of the trial, the above mentioned **Resolution and Partial Judgment** it theobject of a petition before the Court of Appeals presented by the respondent [claimaint, error in the original Spanish* on Friday, the 5th of December of 2003. This, in turn, provoked the suspension of the hearing for the trial set for the following Monday, the 8th of December 8th, 2003.

On having considered the petition as one of *certiorari*, the Court of Appeals denied it by means of resolution notified on January 23, 2004. Being this the procedural state of the case, the Court re-set the trial for May 4, 2004.

In the stated date. neither the plaintiff, nor his lawyer appeared to the Court, nor offered reasons that were justifying his absence. being this the second non-attendance of the plaintiff to a hearing properly notified. After the plaintiff was appropriately forwarned and sanctioned. the case re-set for May 13, 2004, at ten o'clock in the morning. as it appears in the notice of10 of rnay, 2004.

A propos of the hearingf for trial set for May 13. 2004. the plaintiff presented a **Motion to Enter Judgment.** The content of the above mentioned motion was specified and clarified for the record on both parties, being this the terms in which the motion remained submitted in his pertinent part:

., **The real controversies between the parties are the one contained in the partial judgment considered as a resolution, other matters pending consideration are related to assets in which both partiess are in agreement that they are community property or exclusive property in nature, and that the Honorable Court can adjudicate from the documentary evidence and the stipulations of facts that the parties agreed to in the Pre- Trialof Conference Report.**

In synthesis, the plaintiff accepts the character and quantity of the assets **and debits** that are contained in the Statements of Assets, Debit and Capital dated on November 30, 1999 prepared by the CPA Rafael Nigaglioni for the defendant

Also it was clarified and was recognized for the record: (1) that the shares of **B.R.I.M. Incorporated** were an exclusive patrimony of the defendant, since this way it had been recognized in the stiplulations of facts incorporated into the **Amended Report On Preliminary Conference Between Lawyers** and this was additionally deducted from the tract related to their acquisition,whether personal title of the defendant, or through corporations of his property; (2) that Aldea Development is a subsidiary company of the exclusive corporation B.R.I.M. Incorporated and, therefore, exclusive of the defendant and (3) that the quantity, patrimonial nature of the accounts or certificates of deposits, and other properties identified in the said Amended Report, are those there expressed, being their value said there indicated (the VIth Stipulations of Fact "a" to "n" of the **Amended** Report.

As has been said, the preceding three clarifications eliminated as object of controversy between the parties' the particular property determinations that the Court would have had to do with respect to B.R.I.M. Incorporated, Aldea Development. and the dineros placed in the banking houses identified in the Amended Report, being recognized. as for these moneys in bank accounts, its community property nature.

Finally, by means of **Joint Motion in Compliance with Order** presented on June 23, 2004. the parties agreed that the real value in market of the jewelry property of the legal conjugal partnership of joint property, according to appraisal, it is the amount for **$190,650.00.** This way they also informed that the firearms the property of the conjugal partnership. even if they could not have been estimated, they will liquidate by means of private selling, the proceeds to be distributed in equal parts between the parties. In case any of the parties has interest in a weapon in particular. he{she} will pay to other one the portionthat corresponds to him)her of its market value.

Taking into consideration the Amended Report On Preliminary Conference Between Lawyers as well as the content of the **Motion So that Sentence Is Pronounced** of May 13, 2004, clarified on the parts according to consta of the bill of this date notified on May 21, 2004, and, for Last, the **Joint Motion in Fulfillment of Command{Order}** of June 23, 2004, the Court gives them his approval and adopts them as{like} the

determinations of facts that librcmente the ancient{former} spouses have agreed to identify, to value and to distribute: you goods in the credit of the legal company of community properties. The expressed agreements constitute, in effect, a judicial deal{transaction} of the present cause as for all the matters there included.

Attended the clear intention, meaning, and scope of the stipulations and agreements previously related, the Court understands that these conventions and the concomitant agreement no to controvert or question them, they are of the same nature of a stipulations for settlement agreement, for that the parties are boud respect its terms.

The claimant, nevertheless, has reserved the right to appeal the judgment appealed herein issued, in the measure that could be appealled the determination that here made that the shares of Puerto Rican Cement possessed by BRIM Incorporado are exclusive property. Fact that we adjudicated by means of the resolution notified on November 26, 2003, rejecting the objections of estoppel that the claimant suggests.

It is the position of the claimant that, in spite the negotiations tract that establishes his exclusive character, recognized by the claimant, the defendant is barred by the stated doctrines of one's own acts, of collateral estoppel by judgment and of allegations founded on his own errors, from denying the community property character of the above mentioned shares.

This, in three paragraphs, the claimant formulates and bases her exposition under the section of "Theories". in pages 2 and 3 of the **Amended Report On Preliminary Conference Between Lawyers:**

[1] ***In spite of what was stipulated*** **the claimant asserts, contrary to** the position of the defendant one that as for the principal assets of the parties, which constitute shares in Puerto Rican Cement Co., the party defendant *is prevented by its own acts* from denying the community property character of the above mentioned assets, since the shares of Puerto Rican Cement Co. have been *possessed* by both parts through several such corporations as Ponce and Panamá Marine Co (Panamanian entity) and, to the present, by B.R.I.M. Corp. (Puerto Rican entity) that received them from Ponce and Panama Marine Co. In litigations had

between several groups of shareholders of the Ferré family, [therein] Don Herman Ferré Roig *claimed* that the shares of Ponce and Panama Marine Co *were a community property of the parties herein.* This happened in a case litigated before the Superior Court of Puerto Rico, and in other before the courts of Panama. The contradictory conduct is inadmissible in law.

[2] Also, the first shares of Ponce and Panama Marine Co were bought by the use of an account of the defendant opened in First National City Bank, years before the marriage to the claimant, the above mentioned purchase produced a community debt: an overdraft of the above mentioned account, since the bank paid the check of purchase and [the account] had no sufficient funds. The overdraft was covered with a check from Sound Investment Corp., a corporation possessed by Don Herman Ferré Roig.

[3] With respect to the legal information about title the shares of Puerto Rican Cement Co., Don Hermán Ferré Roig submitted information so that Puerto Rican Cement could refer it to the Securities and Exchange Commission for various periods, [detailing who were] the shareholders of Puerto Rican Cement Co. In the above mentioned reports it is stated that a co-shareholder [was] the wife of Don Hermnan Ferré Roig that for the informed periods was the claimant .lo-Ann Crossley.

The matter stated in the Last two paragraphs of the argumentative theory of claimant above transcribed do not represent actually any estoppel to award that the shares of Puerto Rican Cement Company in the tenancy of B.R.I.M.Incorporado are the exclusive of defendant. since clearly it is established by his tract of acquisition and negotiation. and as{like}. independently of it. it has been acknowledged in the stipulations signed by the parties.

On the one hand. the [point] raised in the second paragraph with regards to the theory that the acquisition in 1972 of the first ten shares of Ponce and Panama Marine Co. what resulted, according to the claimant, in an alleged *communiiy debt* were clarified and controverted by the content of the facts stipulated " a ","b", "c", and "d".

As there it is recognized. said ten shares were acquired by virtue of a

purchase option agreement and Option Agreement " executedted on December 20 of 1964 between the defendant and his father, Don Herman Ferré Aguayo. Even though the purchase of the above mentioned shares was carried out it of November, 1972, during the existence of the marriage (contracted the previous year, June 2, 1971), it is processed as goods acquired by means of the year of a personal right of preferentia acquisition belonging exclusively to the defendant. 1 [Note 1: A propos of this matter, José Luis de los Mozos explains the following: "Within this category of exclusive property,. there are comprised} all those who substitute exclusive other exlusive,as well as they are a result of the reinvestment of exclusive funds, or of the mere replacement of some for others (as in case of the exchange) or because they are a result of the year of a right tor repurchase, or of other real or personal property right of preferential acquisition, belonging to the only one of the spouses. In all these cases, one way or the other, the property right of subrogation comes into play. José Luis de los Mozos, Comentarios al Codigo Civil y Compilaciones Forales, Revists de Derecho Privado, vol. XVIII - 1, 2nd Edition, page 136. See. also, the holding in *Heirs of Santaella v. Secretary of Treasury,* 96 D. P.R.442.]

It was established, also, that the bounced cheque without sufficient found [drawn] onFirst National City Bank. issued by the defendant it of November, 1972, in payment of the above-mentioned ten shares, as well as that of Sound Investments, Inc., drawn six days later to cover the mentioned overdraft, were coming from accounts and exclusive funds. In the first case, of a personal account of the defendant, and in the second one. of an exclusive corporation organized in 1965.

Concerning what the claimant characterizes as*" legal information on the title of the shares of Puerto Rican Cement Co.* ", that allegedly *the defendant provided* the Securities and Exchange Cornrnission, we do not find that the information given by the defendant to the above mentioned regulatory entity of securities expresses that Mrs. Crossley be "co-shareholder" of shares of Puerto Rican Cement Co. under the tenancy of B.R.I. M. Incorporado a corporationn of which the defendant is sole and exclusive shareholder, as it is recognized in the Amended Report On Preliminary Conference Between Lawyers.

The forms submitted to the above-mentioned commission by the defendant, as they were completed by this one. they do not express what the claimant alleges. See: exhibits 10a and 10b of the **Reply** of the defendant presented on October 31, 2003.

On the other hand,. the information that is contained " proxy statement " that the claimant attached to her **Reply to Motion of Summary Judgment** submitted to the above-mentioned [governmental] entity by Puerto Rican Cement Co., and not by the defendant, it does not have the meaning that is claimed of that she has a community property participation in the shares of Puerto Rican Cement Co., nor the effect of having converted in community property. **during the existence of the marriage,** property which original tract of acquisition, and according to what was stipulated, has been demonstrated that are exclusive [property] of the defendant.

The claimant proposes also that, ***in spite of what was stipulated,*** the defendant ***is estopped by his own acts*** from denying the community property character of the shares of Puerto Rican Cement Co. that he possessed through B.R.I.M. Incorporated, **since •• in litigations had between several groups of shareholders of the Ferré family, Don Herman Ferré Roig *claimed* that the shares of Ponce and Panama Marine Co were a community property of the parts herein appearing".**

The Court has examined the documents offered by the claimant, to wit, the consolidated complaints presented in Puerto Rico, the one presented in Panama, and the stipulated agreement that ended the stated litigations between groups of shareholders of the Ferré family.

In none of the above-mentioned writings this supposed claim of community appears.

On the contrary, the final and firm decree that ended these suits this is not it recognized nor there is an allusion to this claim, it does not even mention Mrs Jo-AnnCrossley in any form.

Among other things, the above mentioned stipulated agreement

filed on November, 1994 before the Superior Court of San Juan, and incorporated into the judgment that it put an end to the consolidated suits *Ki\C 91-0090 and Ki\C-85-6252* expresses the following:

" (a) **The stipulation will not include the transfer, resignation or transfer for the claimant of any assets of B.R.I.M. Incorporated not to the shares of any corporation that has direct or indirect control over B.R.I.M. Incorporated. Igualmcntc the defendants with regard to South Management Corp.**

(b) **There will be approved by the directors of the concerned corporations the agreements that would be necessary and there will be sent the resolutions that need each of the parts to transfer, respectively, the common shares of South Managernent Corp. and B.R.I.M. Incorporated into his proprietors Don Luis A. Ferré Aguayo, Don Antonio Luis Fcrré, Mrs Rosario J. Ferré and Don Herman Ferré Roig.** (Underlined ours).

(e) There will be transferred to the claimants in both suits, any participation, right or interest that any of the defendantss and/or any corporation controlled by these parties could have in **Sound Investments, Inc., Ponce Bay Land Enterprises, and in any other corporation under the control of the party plaintiff.**

.... (e) In case of sale of the real estate located properties located in Mar Chiquita, in Manatí, Puerto Rico, for a sale price in excess for E6,000,000.00 **Don Herman Ferré Roig will additionally compensated** with twenty one point five per cent (21.5 %) of the excess for $6,000,000.00.

... (g) The partiess will sign reciprocally mutual and absolute releses. Equally there will be releases from liability to the directors, officials, employees and successors of the different corporations and the cases in Court will be dismissed.

(h) The parties claimants in both suits will receive, on or before December 15, 1994, the amount of two million one hundred thousand dollars

($2,100,000.00) in cash **for his participation in the shares of the family companies, to wit: Ferré Development, Inc., Reparada Devclopment Corp., Alhambra Development, Puerto Rico Pulp and Paper Corp., Puerto Rico Clay Products, It Inversiones Ferré, Mar Chiquita, and Ponce and Panama Marine, S.A.**

.... (k) That the appearing partiess will implement diligently all the agreements of this stipulation in such a way that on December 15, 1994 **the claimant** receives the stipulated amount that is mentioned **in precedent paragraph (h).**

The literal tenor of the above mentioned agreement points reiteratedly to **the claimant, Herman Ferré Roig,** is the only and real party in interest, and necessary counterpart of the stipulation perfected with other members of the Ferré family, with regard to his exclusive participation in the **family enterprises** that there are listed.

The above mentioned participation. as its is acknowledged in the stiplulations incorporated into the **Amended Report On Preliminary Conference Between Lawyers, is** preexisting to his marriage to Mrs Crossley.

In the same tenor Herman Ferré Roig and Sound Investments, lnc., corporation organized in **November, 1965, of which Mr. Ferré is the only shareholder,** they are the Only plaintiffs that the agreement mentions and to which it awards any participation, right or interest that " any of the parties defendants" (Luis A. Ferré Aguayo, Antonio Luis Ferré, and Rosario Ferré) " could have in Sound Investmcnts, Inc., Ponce Bay Land Enterprises, or any other corporation under thecontrol of the party plaintiff ".

This way also. Herman Ferré Roig is the claimant, in accordance with ordinal one **"k"** in the stipulation agreement would receive the sum of $2,100,000 for his exclusive participation in the family enterprises that are related in ordinal **"h"** of the stipulation incorporated into the judgment.

The dispositive part, transcendent and constitutive of the

convention of the decree is the entire content of the stipulation for settlement signed by the partiess.

Said decree has the effect of res judicata - so much as for the mutual relinquishments and concessions in accordance with what the stipulation for settlement granted each of the parties, as also as for the recognition of exclusive and sole title of defendant herein over the assets and capital shares in the corporations and real estate that in the above mentioned stipulation for settlement are listed,. particularly his exclusive participation in co-defendant corporation, Sound InvestmentsJnc .. and in B.R.I.M. Incorporated.

To emphasize what is evident, the above mentioned judgment by stipulation does only corroborates and validate the tract and consequent exclusive title that in this suit the parts have recognized again.

Finally. it must be clear that the doctrine of one's own acts that the claimant invokes cannot have the talismanic effect of converting into community property what acknowledgly is exclusive property, and neither it can be invoked in abstraction of the real requirements for its application. Concerning the doctrine. the Spanish Supreme Court has said:

Truly. the general principle of law that nobody can go validly against his own acts, has been sanctioned since early time by the case-law of this Chamber, having declared as for its scope that 'one's own acts against which it is not licit to exercise an action are those that, for their transcendental character or for constituting a convention, cause state, defining inalterably the juridical situation of his author or those that are directed to create, modify or extinguish some right, as what the said principle only has application when the performed act is opposed to the acts that will have created a relation or situation of law that could not be altered "unilateralmente for whom it was bound to respect. '. Judgment of 10 of June, 1994, *Aranzadi Repertorio de Jurisprudencia* 5225.

The Court has neither found, nor is it deduced from the object of the above mentioned suits, or of the requests of remedy in any of the three judicial processes on which the claimant tries to support her invocation of the doctrine of one's own acts, ***certain conduct*** **of the defendant, who has**

generated **a situation opposite to the reality, or who, by means of such a appearance, has influenced the conduct of** ***the others,*** **or that is a base for the confidence of** ***another*** **party that has proceeded honestly acting in a way that it would cause to him a damage if his confidence was remaining defrauded or that for his** ***transcendental*** **character or for constituting a** ***convention, it has caused state, creating, modifying or extinguishing some right,*** **or that it is opposed to acts that will have created a relation or situation of law that could not be altered unilaterally for whom it was bound to respect her "** as it has been explained by the cases. *General Electric v. Concrete Builders.* 104 D.P.R. 871. 878 (1976).

In the-context of: the procedures that the claimant brings into consideration on having invoked the doctrine of one's own acts. has not constituted aconduct of the defendant conscious and concretely to create a new legal status, differently from the one that acknowledgdly already existed and could not be altered during the marriage.

Of other hand, the acts against which one cannot act should be " licit and authorized ". It cannot. therefore. cannot apply to acts " **that have been express and completely forbidden",** or " **when with them there are violations of laws which non-observance cannot not be corrected by agreement with prejudice to the public interest** ", or " **when the supposed objection act lacks obligatory efficacy** ". Finally " **... it is indispensable that the performed acts are juridically effective or juridically valid "**

To agree to the pretension of claimant would bring about, by effect of some statements, isolated, marginal and inconsequential, in the context and with respect to the purposes of the judicial procesees in which they were made, that do not have the meaning and transcendancy that are pretended, and that **do not constitute a convention between the parties,** that they indeed constitute a binding agreement, and able to be claim specific performace, in clear breach to the provisions the Civil Code of Puerto Rico in its Article 1286 (31 L.P.R.A. § 3588) that prohibits the donations between spouses during the validity of the marriage, as well as the promise to effect this donation. *Delgado v. Monroig,* 57 O.P.R. 474 (1940).

To try to transfer to the field of promises to execute a contratothing that still if only for ends{purposes} of argumentation we should accept that the expressions in which the claimant founds his claim configure a donation between spouses, since clearly it is claimed, the same one would turn out to be radically void and an ineffective right. As it was said in the said case of the *Delgado v. Monroig*:

" Processing of transferring to the field of the promise to run a contract of the field of the contracts themselves. it seems to us that it is equivalent merely to a change of nomenclature. If during the existence of the conjugal partnership of joint property a contract cannot be held, the agreement to executed it later, after the dissolution of the marriages subject exactly to the same objection. "*Delgado. supra*, page 477. See also, concerning the premises of application of the doctrine of the one's own acts, according to explanation by Díez Picazo, the following comments of Manresa to the article 1334 of the Spanish Civil Code, equivalent to 1286 of the Civil Code of Puerto Rico:

" The donations between spouses. they are usually, void. This means that legally they do not exist. It is not, in our opinion, as a voidable act at the will of the donor, but of a nonexistent act, because to declare it voidable would be equivalent to leave the observance of the law to favor of the will of the same spouses who were breaking it, maintaining the validity of the donations prohibited, by not excercising the action of nullity for four years. which is an absurdity. "

The act is nonexistent, and that's why its nonexistence can be claimed at any time by the donor or for his heirs, or by any affected person, be it by action or by exception. Only this way it can have effective sanction, within the possibilities of the legal precept.

Considering the markedly prohibitive spirit of the law. and the reason in which we have said that it is inspired. it is clear that **the interested parties cannot, under any pretext, not comply with it. It is a precept dictated in the general or public interest, by virtue of** which the **law imposes itscriterion to the will of the individuals....** Manresa and Navaro. Comentarios al Código Civil Español, volume IX Lib . IV-Tit lll-Cap. II,art. 1334. Editorial Reus, Madrid, 1950.

Based on the facts and the law previously expressed we repeat our rejection of the **doctrine of the one's own acts** as invoked by the claimant and repeat our previous decision in which we determined that the shares of Puerto Rican Cement Company possessed by B.R.I. M. Incorporated, that have been from his origin and through its subsequent negotiations exclusive patrimony of the defendant Herman Ferré Roig.

In accordance with the stipulations submitted by the parts, the following ones are the properies of the legal conjugal partnership of joint property subject to division:

Moneys deposited in banks

1. Account number. 095-1250900173 BBVA ($50, 155.92)
Balance to September, 2004: $58,261.96
2. Account number. 812-000907 in Oriental Bank Balance to September, 2004 ($63,509.16)
Balance to September 2004: $73,773.31
3. Account number. 226-064483 BPPR ($34,271.34
Balance to September, 2004: $39,810.16
4. Account number. 31040 10392 Banco Santander ($62,868.49)
Balance to September 2004: $73,029.09

Total in deposit accounts: $244,874.52

Chattel Property:

5. Automobile Aston Martin: $100,000.00
6. Automobile Porsche: $50,000.00
7. Share in Ponce Yacht Club: $100.00
8. Hunting throphies: $65,000.00
9. Furniture and appliances **$515,000**
10) Jewelry **$190,650**
11) Works of Artc **$26,000**
12) Total value of chattel: $446,750

Judgment

Bearing in mind the stipulations contained in the **Amended Report On Preliminary Conference Between Lawyers,** such as they have been specified and clarified by the parties, and the law applicable as previously stated, the Court does the following adjudication to liquidate the community property of the legal conjugal partnership of joint property previously listed, determining that each spouse will receive, in payment of his(her) participation, half of the expressed values and, in the case of the moneys deposited in banking institutions the accrued interest since sc decreed the divorce between the parts in September, 1999, up to the moment of his final settlement for today judgment.

The quantity awarded to the claimant, Mrs. Jo-Ann Crossley, of $122,437.26 equivalent to the half of the moneys deposited in bank accounts according as detailed previously, as well as the of the expressed value of the chattel property and other valuables of the conjugal partnership, that is to say, the amount of $223,375.

Therefore, I adjudicate to the defendant, mister Herman Ferré Roig, the same amounts and in the same concept.

In accordance with what was agreed between the parties in the **Joint Motion in Compliance to Order** filed on June 23, 2004, the firearms belonging to the conjugal partnership will be liquidated by means of private sale and the net proceeds will be distributed on equal parts.

The parties are Ordered to proceed to the division and distribution of the propertiesin accordance with what was herein adjudicated within the term of thirty (30) days.

Enter and notify.

Given in Carolina, Puerto Rico, today, January 27, 2005.

Maria del Carmen Matínez-Lugo
Superior Judge

COMMONWEALTH OF PUERTO RICO
COURT OF THE FIRST INSTANCE
CAROLINA'S ROOM

JO ANN CROSSLEY OF FERRE

Civil Núm. FAC1999-0621 (0401)

Claimant

On: Liquidation of Society of Joint property

VS

HERMAN FERRE ROIG

Defendant

REPLY TO MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

The plaintiff APPEARS, through her lawyer who signs and very respectfully EXPRESSES, ALLEGES AND REQUESTS:

I. - INTRODUCTION.

The present litigation's purpose is to liquidate the conjugal partnership of joint property formed by Don Herman Ferré Roig and MrsJo-Ann Crossley, who was constituted after they married on June 2, 1971.

It is the position of the plaintiff that all the property acquired during the marriage by both parties is community property.

The plaintiff does not have in her possession the records of the numerous properties, and of the obligations of the conjugal partnership of joint property, since all the records were kept in the offices of Don Herman Ferré Roig, and they remain there.

The plaintiff relies in the presumption of law that the property acquired in this case, acquired after the marriage is community property, and that the *onus* of proving e that a property is exclusive [of one of the

parties] is borne byn that party that claims it. Article 1,307 of the Civil Code, 31 LPRA 3647.

As for the principal assets of the parties, which are the funds which constitute the proceeds from the selling of the shares of Puerto Rican Cement Co., the defendant is barred by its own acts from denying the community property character of the above mentioned assets, since the shares of Puerto Rican Cement Co. have been possessed by both parties through several corporations such as Ponce and Panama Marine Co (Panamanian entity) and to the present through BRIM Corp. (Puerto Rican entity) that received them from Ponce and Panama Marine Co. In litigation had between several groups of shareholders of the Ferré family, Don Herman Ferré Roig claimed that the shares of Ponce and Panama Marine Co were a community property of the parties herein. This happened in a case v before the Superior Court of Puerto Rico, and in other before the courts of Panama. The contradictory conduct is inadmissible in law.

Also the first shares of Ponce and Panama Marine Co they were bought though the use of an account of the conjugal partnership of joint property with First National City Bank, which purchase produced a community debt: an overdraft in the above mentioned account, since the bank paid the purchase's check that temporarily did not have suffient funds. The overdraft was covered with a check of Sound Investment Corp., corporation possessed by Don Herman Ferré Roig.

In relation to the legal information about entitlement of the shares of Puerto Rican Cement Co., Don Herman Ferré submitted information so that Puerto Rican Cement Co was detaching the Commission of Values and Stock Exchange (Security and Exchange Commission) who were, for the diverse periods, the shareholders of Puerto Rican Cement Co. In the above mentioned reports it is known as{like} co-shareholder the wife of Don Herman Ferré Roig that for the informed periods she was the claimant Jo-Ann Crossley.

Finally, Don Herman Ferré, in affidavit of April 17th, 1986 before the Public Notary Miguel Pascual Estebán , under the testimony number 22123, declared under oath that herein claimant was also an owner of the shares in controversy.

Don Herman Ferré cannot now allege that the information he gave to the to the Securities and Exchange Commission under oath, is not correct. This assertion and the pretence of exercising a cause of action are prevented by the doctrine of *nemo auditur suam turpitudinem allegans,* recognized current in our case-law: *Rubio Sacarello v. Roig,* 84 DPR 344.

II. - DOCUMENTS IN SUPPORT OF THE PRESENT DOCUMENT.

1.-Cheque drawn against First National City Bank (today Citibank) for the acquisition of shares of Ponce and Panama Marine Co.

2. Statement of account of First National City Bank that indicates the payment of the check, in overdraft.

3. Documents of records of the Securities and Exchange Commission.

4.-Complaint of Don Herman Ferré, Mrs Jo-Ann Crossley and their conjugal partnership of joint property against the group of Don Luis Ferré, Top Court of Puerto Rico.

5.-Demand of Don Herman Ferré, Mrs{Ms} Jo-Ann Crossley and his society of joint property against the group of Don Luis Ferré, Court of Panama.

6.-Affidavit of Don Herman Ferré Roig before the Public Notary Miguel Pascual Esteban, testimony number 22123.

III. - ARGUMENT OF LAW.

The applicable law is the Civil Code of Puerto Rico.

The article 1,301, 31 LPRA 3641, provides that there are community property all the properties acquired by any of the spouses, through onerous title, during the marriage, the properties obtained by concept of industry, salaries or work of the spouses; and the fruits so much{many} of the community properties as those of the exclusive ones. The civil fruits of the chattel and real estate that could be considered to be

exclusive of Don Herman, are still community property, and they include the payments received from leases, perpetual rents, life revenues or similar others as dividends, loans in lieu of dividends, interests and appreciation of the properties, both community property and exclusive of two spouses. Article 289 of the Civil Code, 31 LPRA 1142.

The article 1,307, 31 LPRA 3647, establishes the presumption and change in the *onus* of proof, that provides that all the properties of the married couple is reputed to be joint property, unless specifically it is otherwise affirmatively proven that it belongs to the husband or to the wife.

The article 1,203, 31 LPRA 3342 provides that the presumptions of law, like the established one by the article 1,307, supra, relieves of any proof to those faovred by the presumption. Due to this, plaintiff only has to indicate the properties belong to the marriage and request half of the same ones, or its equivalent value .

Even if the doctrine of res judicata does not apply to the facts of the present case the doctrine of collateral estoppel by judgment does apply to the case litigated in Puerto Rico between the members of the family Ferré, supra, in regards to the shares of Ponce and Panama Marine Co. as joint property of Don Herman and Mrs Jo-Ann.

Also it results from application the doctrine of one's own acts, in force in Puerto Rico as one of the general principles of the law that are recognized under the provisions of the article 7 of the Civil Code, 31 LPRA 7. See the case of *International General Electric v. Concrete Builders*, and Diez Picazoand Ponce of León, *La doctrina de los actos propios*, Bosch, Barcelona, 1963, page 151 inter alia and José Puig Brutau, *Estudios de derecho comparado*, Bosch, Barcelona, page 126 *et seq.*

The content of the norm that to nobody it is licit to go against his own acts has foundation and root in the general principle of law that orders to proceed honestly in the juridical life. The contradictory conduct does not have a place in the field of the law, and must be barred. This principle has a like parallel in the English Law: the doctrine of estoppel. N6 The typical minimal effect that must be recognized after the unilateral acts n7 is that they establish an estoppel. This prevents the subject to which the

unilateral act is attributable from being able to act in contradiction with his stated will. *International General Electric, supra*, 104 DPR, 871,874.

Even if the case-law of the Supreme Court of Puerto Rico has not examined a case in which to apply the doctrine of one's own acts to a suit of liquidation of conjugal partnership of joint property, the Spanish case-law has held that this doctrine applies to cases of liquidation of conjugal partnerships of joint property. See, for example: the judgment of April 7, 1997, issued by the Civil Section of the Supreme Court of Spain, RJ 1997\2741.

In the Anglo-American common law doctrine closest, in terms of content, to the doctrine of one's own acts is the so-called " *estoppel in country* ", see *Black's Law Dictionary*, 6th. Edition, West Publishing Co, 1990, to the page 551, which defines it as:

> "The doctrine by which a person may be precluded by his own act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." (Citations omitted)

Again, by way of analogy, the party appellant - claimant [should read "defendant", error in the original Spanish], is barred by his conduct: allegation of community property (in the suits in Puerto Rico and Panama) and of co-ownership (in the documents of the SEC and his own affidavit), from alleging in this litigation and trying to have declared in his favor a supposed condition of "exclusive" as to the properties in controversy.

In addition to the doctrines of one's own acts and of *estoppel*, in the case at bar the facts call for the application of another doctrine from the Anglo-American common law, but also from Roman roots: *nemo auditur suam turpitudinem allegans, nemo of improbitate sua consequitur actionem* " I will not hear the one who alleges his own turpitude, nor from his own fault can prosecute an action ", compiled, others, in the case of *Rubio Sacarello v. Roig*, 84 D.P.R.344 (1962) and *Serra v. Salesian Society*, 84 D.P.R.322 (1962).

In case of *Rubio, supra*, this Honorable Superiority referred to this

doctrine from a quotation of Lord Mansfield, in footnote number 13, which even ifit does not quote directly, refers to the case of *Holman v. Johnson,* 1775, 1 Cowp 341, 343, 98 English Reports (Full Reprints) 1120, in which the mentioned chancellor of England, Lord Mansfield, expressed the following:

> ***' The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy; which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted.*** It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, *potior est conditio defendentis.*'
>
> (Emphasis added)

From the quotation of Lord Mansfield it is clear that in situations like the one at bar, considerations of public order are present " public policy ", and it due to them and not because of any consideration for the adverse party that one denies to him the cause of action or defense to the other party, the defendant herein.. The consideration of public order is the presentation of information before the Securities and Exchange Commission in which the defendant declared the shares in controversy belonged also to his wife, and his current denial that said assertion is true.. If it was considered that the current position is the correct one (the shares

belong to the defendant and not to him and to the claimant) then the information given SEC was incorrect, and, therefore, the provisions of the Securities and Exchange Act of 1934, 15 78ff, would be operative, in that they provide as follows:

§ 78ff. **Penalties**

(a) Willful violations; false and misleading **statements.** Any person who willfully violates any provision of this title (other than section 30A [15 USCS § 78dd-1]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any **statement** in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration **statement** as provided in subsection (d) of section 15 of this title [15 USCS § 78o (d)], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which **statement** was false or misleading with respect to any material fact, shall upon conviction be fined not more than $ 5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $ 25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports. Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 15 of this title [15 USCS § 78o (d)] or any rule or regulation thereunder shall forfeit to the United States the sum of $ 100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal **penalty** for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable to the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, **stockholders,** employees, or agents of issuers.

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A [15

USCS § 78dd-1] shall be fined not more than $ 2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1]shall be fined not more than $ 100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or **stockholder** acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 USCS § 78dd-1] shall be subject to a civil **penalty** of not more than $ 10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or **stockholder** of an issuer, such fine may not be paid, directly or indirectly, by such issuer. "

On the other hand, the Penal Code of Puerto Rico, typifies as a crime the provision of false statements, in several forms, in articles 225, 33 LPRA 4421 (Perjury), 271, 33 LPRA 4591 (false statments) and 217, 33 LPRA 4392 (fraudulent Lists and other illegal acts). The above mentioned articles are transcribed in the Addendum.

: How is it possible that a court of justice protects the conduct of a litigant who informs (it alleges now incorrectly) to a public agency that certain property (shares) belong to him and his wife and now he says that the same ones belong onlyto him? and that makes an affidavit in which it expresses the fact: that the shares herein controversy belong also to his wife (and now does he alleges that it is not correct) because the shares belong to him exclusively? In both instances the defendant had alleged the co-ownership of the shares in controversy and now it alleges that they are his exclusive property.

Is worth while remembering what was stated in *International General Electric, supra:* ***the contradictory conduct is inadmissible in law.***

There cannot stay any doubt that, as a matter of law, the properties of the married couple Ferré-Crossley are community property of both, in

particular the shares of Puerto Rican Cement, sold to CEMEX and turned into money at present, and other assets that are possessed through Brim Corporation and other corporations, both domestic and foreign entities.

WHEREFOR it is requested from the Honorable Court to DENY the motion to dismiss presented by the party defendant , for there are questions de fact exist and of law in controversy. AND TO ISSUE PARTIAL JUDGMENT declaring the shares of Puerto Rican Cement (now turned into money for the sale to CEMEX) as COMMUNITY PROPERTY, and DECLARE that the defendant is barrd by the doctrines of one's own acts, *estoppel* and *nemo auditur* from denying now the community property character of the properties acquired during the marriage of the parties, in particular the shares of Puerto Rican Cement (now turned into money). All this with any other pronouncements that may be proper in law..

In Bayamón, Puerto Rico October__, 2003.
I CERTIFY that in today I am sending copy of the present document to Lcdos. Pablo J. Santiago Hernández and Francisco Santiago Vela, P.O. Box 9024226, Saint John, PR 00902-4226.

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ADDENDUM

§ 4421. Perjury

Every person who having sworn to testify, to declare, or to certify the truth before any court, organism, official or competent person, in any of the cases or procedures in which the law was allowing to take such an oath, declares to be true any essential fact, knowing his falsity or declare categorically on an essential fact which certainty he{she} does not consist, it will be sanctioned with sentence of seclusion by a fixed term of six (6) years. With aggravating circumstances, the fixed established sentence will be able to be increased up to a maximum of ten (10) years; in case of attenuating circumstances, it will be able to be reduced up to a minimum of four (4) years.

Also there will incur perjury every person who under the circumstances established in the previous paragraph, will give two or more testimonies, statements, depositions or irreconcilable certifications. In this case it will be unnecessary to establish the certainty or falsity of the facts.

When a person will declare incurring perjury and the above mentioned statement will have the consequence of conviction and seclusion of the accused, established this fact, it will be considered to be an aggravated crime offense perjury to the purposes of the imposition of the sentence, which will be of seclusion for a fixed term of nine (9) years. With aggravating circumstances, the fixed established sentence will be increased up to a maximum of fifteen (15) years; in case of attenuating circumstances, it will be reduced up to a minimum of six (6) years.

HISTORY: Penal code, 1974, art. 225; June 4, 1980, Num. 101, p. 298, sec. 1.

§ 4591. Falsification of documents

Every person who with intention of other one being deceived, with will execute in full or in part, a document, instrument or false writing, by means of which it will be created, will transfer, or otherwise affect any right, obligation or interest, or that falsely it will alter, will, suppress or

destroy, in whole or in part, he will be sanctioned with sentence of seclusion by a fixed term of nine (9) years. With aggravating circumstances, the fixed established sentence will be able increased up to a maximum of fourteen (14) years; in case of attenuating circumstances, it will be reduced up to a minimum of six (6) years.

HISTORY: Penal code, 1974, art. 271; June 4, 1980, Num. 101, p. 298, sec. 1.

§ 4392. Fraudulent lists and other illegal acts

There will be sanctioned with sentence of seclusion by a term that will not exceed of six (6) months, sentence of fine that will not exceed five hundred (500) dollars, or both sentences at the discresion of the court, every person who will commit any of the following acts:

(a) He{She} will give or will be sick, some list, chart or relation required by the fiscal legislation of the Commonwealth or of the municipalities, **false** or with fraudulent information.

(b) To falsely execute or sign any of the oaths, **affidavits** or affirmations needed by the fiscal legislation of the Commonwealth or of the municipalities.

(c) Obstinately he will refuse to answer any audit that by law are authorized by the Secretary of Treasury of Puerto Rico, the municipalities or his agents.

(d) To executd, write, send or offer **false** or fraudulent declarations statements in certifications or documents required by the fiscal legislation of the Commonwelth or of the municipalities.

In any of the previous modes, the court, in its discresion will be able to impose the ssentence of service in the community, instead of the sentence of seclusion.

HISTORY: Penal code, 1974, art. 217; January 9, 1999, Núm. 20, sec. 1; August 21, 1999, Num. 279, sec. 10.